

The Ohio River Company and United Steelworkers of America, Local Union 14262, AFL-CIO-CLC. Case 9-CA-26554

July 16, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT

On November 26, 1990, Administrative Law Judge Robert G. Romano issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, The Ohio River Company, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Reletter paragraph 2(d) as 2(e), letter the preceding paragraph as 2(d), and insert the following as 2(f).

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In agreeing with the judge that the mates' involvement in the deckhand hiring process is not such as to warrant finding them supervisors under the Act, we rely on the following interpretation of the facts, which we believe is implicit in the judge's decision. Based on the unique circumstances described in the record, we believe the Respondent's hiring decision is a process commencing with the initial screening, continuing through the orientation and so-called probationary phases, and culminating only at the end of the so-called probationary phase. Thus, rather than two separate hiring decisions as the Respondent asserts, we view the hiring decision as a continuum at two stages of which—the orientation and so-called probationary phases—the Respondent relies on the mates' expertise and skill in evaluating candidates for employment. We emphasize that a port captain does a final review of a candidate before the hiring decision is made at the end of the so-called probationary phase.

We find *Kansas Milling Co.*, 97 NLRB 219 (1951), on which the dissent relies, distinguishable. The Board decided in *Kansas Milling* that "temporary employees" who worked beyond a 30-day probationary period were permanent from the date of hire, but employees who did not complete the 30-day period were not so considered. Clearly, the case does not stand for the proposition that individuals characterized as temporary employees are per se permanent employees. We believe our interpretation of the unique facts of this case (that the so-called probationary phase of the hiring process here does not constitute a probationary period in the usual sense) is not inconsistent with *Kansas Milling*.

² We shall modify the recommended Order to include a notification provision and we shall conform the notice with the judge's recommended Order. We modify the judge's remedy to provide that backpay (if any) be paid as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970).

"(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply."

2. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN STEPHENS, dissenting.

I cannot join my colleagues in treating the hiring process for deckhands as one in which no one is actually hired until after he or she successfully completes the probationary period. See *Kansas Milling Co.*, 97 NLRB 219, 225-226 (1951) (striker replacements regarded as having been hired even before completion of 30-day probationary period). Further, I cannot agree that the mates' hiring recommendations prior to the selection of deckhands for probationary employment do not constitute the exercise of Section 2(11) authority in that respect.¹

Although I believe that the Respondent almost surely violated Section 8(a)(5) of the Act when it unilaterally changed the mates' work assignments beginning in 1988 (a mandatory subject on which it was required to bargain with the Union), I do not believe we can predicate an unfair labor practice finding on that conduct. That is not the theory pursued by the General Counsel in this case. Accordingly, I would dismiss the complaint.

¹ My colleagues have stated that the mates' hiring recommendations result in new deckhands' being placed in a probationary phase of employment which is not a probationary period in the usual sense. They fail to specify, however, how this probationary phase is to any degree atypical of what one would expect of a probationary employee's status, i.e., one in which the employer's hiring decision is subject to review during an initial period of employment. My colleagues further declare that the hiring decision is made only at the end of the so-called probationary phase, but it is not at all apparent what the employment status of these individuals would then be during this initial phase. It is settled Board law that a probationary employee's status as a bargaining unit employee is premised only on his or her reasonable expectancy of permanent employment. See *Johnson's Auto Spring Service*, 221 NLRB 809 (1975). There is nothing apparent in the record which would establish that these probationary employees, as a class, have no expectancy of continued employment.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with United Steelworkers of America, Local Union 14262, AFL-CIO-CLC as the exclusive collective-bargaining representative of mates, a classification in the unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize United Steelworkers of America, Local Union 14262, AFL–CIO–CLC as the collective-bargaining representative of the mates, a classification in the unit.

WE WILL henceforth apply the terms and conditions of employment of unit employees in the current collective-bargaining agreement to our mates; and WE WILL, on union demand, bargain collectively with the Union on pay and other benefits, and put in writing and sign any agreement reached thereon.

WE WILL make whole, with interest, all the unit mate employees for any loss of pay or other benefits (if any) they may have suffered as a result of the refusal to recognize and bargain with the Union as a representative of mate employees.

THE OHIO RIVER COMPANY

Damon W. Harrison Jr., Esq., for the General Counsel.

Walter W. Christy and S. Mark Klyza, Esqs. (Kullman, Inman, Bee, Downing & Banta), of New Orleans, Louisiana, for the Respondent.

Stanley M. Hostler, Esq. (Hostler and Segal), of Charleston, West Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT G. ROMANO, Administrative Law Judge. I heard this case in Cincinnati, Ohio, on October 3 and 4, 1989.¹ United Steelworkers of America, Local Union 14262, AFL–CIO–CLC (Steelworkers Local 14262) filed the charge in Case 9–CA–26554 against The Ohio River Company (ORCO, or Respondent Employer), on June 15. Complaint issued on July 27, alleging that Respondent had violated Section 8(a)(1) and (5) in that since on or about March 5, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the classification of “mates,” a classification alleged as included in a certified unit. By answer filed August 9, Respondent Employer admitted the Board’s prior determination in 1962 of an appropriate unit that included “mates,” but otherwise has denied the commission of any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the parties on or about December 26, I make the following

FINDINGS OF FACT

I. JURISDICTION

Jurisdiction is not in issue. Employer operates a barge tow line on the Ohio River (and its tributaries), where it is engaged in interstate transport of freight, typically dry cargo that lends itself to bulk hauling, principally coal, but also stone and other aggregates, and steel products. In the course and conduct of its above business, Employer presently oper-

ates a fleet of seven towboats which ply primarily between Pittsburgh, Pennsylvania, and Cairo, Illinois. In material period Employer has derived in excess of \$50,000 from the interstate transportation of freight and commodities in the above business operations.

Complaint alleges, Employer in answer filed admits, and I find, that The Ohio River Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; and, that United Steelworkers of America, Local Union 14262, AFL–CIO–CLC, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Prior Board certification

a. Appropriate unit

On March 29, 1962, the Board’s (then) Regional Director for Region 9 determined that the following employees of Employer constituted an appropriate unit for the purposes of collective bargaining:

All employees of the Employer operating on the Ohio River and its tributaries, on its boats, docks and terminals, including all watchmen, fleetmen, mates and electricians,³ excluding masters, pilots, chief engineers, assistant engineers, office clerical employees, guards, professional employees and supervisors as defined in the Act.

³ All parties have agreed that the unit found appropriate herein should also properly include the following classifications: strikers, firemen, oilers, deckhands, cooks, maids, second maids, daylight men, steersmen; barber green loaders (2 belt type), general laborers, locomotive engineers, conductors (switchmen), car shakeout operators, loaders, dock operators, repairmen, barge pullers, crane operators, derrickboat operators, leaders, dumpmen, car checkers, car records and tunnelmen. The record shows that these classifications are properly included within the unit found appropriate herein. Therefore, in agreement with the parties, I include them in such unit.

b. Certification; union successorship; and collective-bargaining history

Certification in the above appropriate unit issued on May 28, 1962, in the name of a predecessor labor organization, District 50, United Mine Workers of America (District 50). Since 1972 Steelworkers Local 14262 has been successor to District 50 as the exclusive collective-bargaining representative of the employees in the above determined appropriate unit.

Since 1962, ORCO has been signatory to successive collective-bargaining agreements (with District 50, or its successor Steelworkers Local 14262). The most recently expired agreement covering boat employees (including mates) was one which was in effect from July 1, 1986, through June 30, 1989 (the 1986–1989 contract). On June 23, the parties entered into a new collective-bargaining agreement now effective July 1, 1989, through June 30, 1992 (the 1989–1992 contract).

¹ All dates are in 1989, unless otherwise stated.

2. Employer's and Union's representatives

William H. Ferguson is Employer's vice president of personnel and labor relations, and spokesman of Employer's negotiating committee. Stephen A. Frasher is vice president of operations, in overall charge of operation and maintenance of Employer's line haul vessels. Frasher is also a member of the Employer's negotiating committee. W. S. (Scott) Noble is operations manager, located at Employer's corporate headquarters in Cincinnati. Noble reports directly to Frasher. B. L. Riegel is ORCO's manager of crew personnel, and is located at Cincinnati, along with a ORCO's personnel department, where all hiring is done.

Huntington, West Virginia, is the central point of ORCO's boat operations; and Ohio River Terminals Company, an affiliated terminal company is located there, as is the office of Ray Thornton, ORCO's port (shoreside) captain. Thornton reports directly to Noble; and ORCO's captains report on operations to Thornton. David Brown is currently training director at a Paducah, Kentucky training facility used by Employer for certain screening of job applicants, or candidates for employment.

Jim Bowen is a district director of the Union, and Bud Ward is a staff representative of Steelworkers. Ward was involved in negotiations with ORCO. Employed as a watchman, David F. Pauley is vice president of Local 1426, and a member of the Local's negotiation and grievance committee.

3. Contract coverages

Both 1986–1989 and 1989–1992 contracts have the same recognition clause:

The Company recognizes the Union as the sole collective bargaining agency for all employees of the Company and operating on the Ohio River and its tributaries, on its boats, but excluding masters, pilots, chief engineers, and executives.

4. Business operations

ORCO is a division of Midland Enterprises (ME), which has a number of similar divisions, including sister companies to ORCO which provide dispersed transportation (towing) services on the rivers (apparently as far as the Gulf of Mexico, e.g., Red Circle Transport). In any event, one such ME divisional company, Orgulf Transport (Orgulf) operates 15–16 boats, and another Chotian Transport operates 8 boats. Red Circle and some three other divisions of ME individually operate seven or fewer towboats, respectively.

In the period of the early 1980s through 1987, ORCO experienced a period of substantial business depression, its operation shrinking from an operation of 16 boats to 6. During this same period, ORCO was involved in no hiring at the deck level. In 1987–1988 business began turning around. ORCO presently operates seven 4000 horse power, twin engine towboats, each of which is capable of hauling 15 barges and approximately 22,000 tons of product at a time. In mid-1988, ORCO began hiring employees again at the deck level. Other ME divisions experiencing similar upturn in business had begun their hiring process even earlier.

a. The Paducah, Kentucky facility

In regard to the required deck hiring due to business upturn, since sometime in 1987, ME divisions have used a training facility that is operated at Paducah, Kentucky, where many of the rivers that ME operates on come together. (There is also a central supply warehouse company located at Paducah, Kentucky, that services boat supply needs of all divisions of ME, including ORCO.)

The Paducah training facility (Paducah facility) has been used by all divisions of ME in a basic orientation program conducted there for evaluation of job applicants prior to their hire. The Paducah facility's geographically central location has minimized the effort of getting people to a single location for the screening and hiring process conducted there, one that has materially newly involved mates.

ME divisions are geographically spread out. Certain of the divisional companies have union contracts, e.g., Orgulf and Red Circle. Mates apparently came out of those bargaining units as supervisors just before Frasher was hired (1984). The record does not reveal whether those units were certified. In any event, they are *not* involved in this proceeding.

The screening and hiring program conducted at the Paducah facility appears to have been an outgrowth of a hiring function (plan) for ME divisions overall. In any event, Frasher testified that hiring needs of all divisions are handled there; and, the orientation program conducted there was approved by Ferguson. (Ferguson did not testify in this proceeding.) Screening of job applicants by several divisional companies have taken place there contemporaneously.

Frasher, though employed by Employer, has certain responsibilities in other divisions, including responsibility over the personnel of affiliated companies. Though Frasher's responsibility arises only when an employee boards a vessel for an actual tour of duty, Frasher was involved in the planning of the orientation program. However, Frasher was not fully versed in certain later developments in the particulars of the program conducted there.

b. Tours, boat complement, and watches

ORCO's towboat employees basically work 30 days on, and then they have 30 days off, though a given tour, or trip may extend to 35 days. In general, the employees are frequently away from home; and the work is physically demanding. Since at least prior to 1984, ORCO's towboat complement has been 10. (Any earlier reductions in towboat complement as indicated of record are immaterial to the resolution of the instant issues.) ORCO's boat complement materially consists of the master (captain), a pilot, a chief engineer, assistant (relief) engineer, a cook, and five individuals working in a deck department, namely, a mate, watchman, and three deckhands (including one deckman identified as swingman).

c. Forward and after watches

Unit (and nonunit) employees regularly work 12 hours a day, but they do so on alternating 6-hour watches (i.e., two shifts of 6 hours on, and 6 hours off), identified as (alternating) forward and after watches. Those on *forward watch* work their first forward watch between 6 a.m. to 12 noon, and (after 6 hours off) work their second forward watch from 6 p.m. to 2 midnight. *After watch* in turn first works 12 mid-

night to 6 a.m., and a second after watch from 12 noon to 6 p.m.

Essentially, normally working a 6–12 forward watch is the captain, chief engineer, a watchman, and two deckhands, one of whom is the swingman. Normally working a 12 noon to 6 p.m. after watch is the pilot, relief engineer, the mate, an one deckhand. The cook works no particular shift.

5. Duties of employees

a. *The captain and the pilot*

The captain has overall responsibility for the boat, its complement, and its operations, including the towboat's seaworthiness, navigation, and security from damage and/or wreck. The captain is the master of the vessel, and is so classified. The captain has responsibility for and authority over everyone who is working on the boat. The captain receives his orders only from above, and reports most directly to the port captain.

The captain, and the pilot, who are both supervisors, and who operate and steer the boat on the alternating forward and after watches, respectively, are required to be licensed under Coast Guard regulations. The mate, next in unquestioned deck line, but contested as in deck line management, is not.

While on their separate watch, the captain, and the pilot are restricted to the wheelhouse. Nonetheless, the captain additionally has management oversight of the deck department. To the extent certain of Frasher's testimony would contrarily indicate that the mate has management responsibility for the deck, and the captain for everything else, weight of credible evidence is to the contrary, and the exaggeration is not credited. The captain is concerned with all tow configurations.

The captain's limited disciplinary authority

According, to Frasher a captain has the authority to discharge employees. There is some confusion in the evidence submitted on the captain's authority to discharge employees (directly). The current contract appears to provide that an employee will be first suspended, and not immediately discharged, in order to enable certain applicable provisions of the grievance and arbitration procedure to be applied, if the involved employee desires it (G.C. Exh. 8, p. 14).

Sam Murphy has been an ORCO mate for more than 10 years. Murphy achieved mate status with 18 years of prior deckhand experience. Thus, Murphy was employed as a deckhand initially in 1960, and worked as such thereafter for 12 years before being promoted to watchman in 1972. Murphy then worked in the watchman classification for another 6 years before he was promoted to the mate classification in 1978. Effectively, Murphy has over 28 years of experience in ORCO operations.

Called as a witness by Respondent Employer, Murphy confirmed that captain does not have the authority to immediately, or directly hire or fire, nor to layoff or recall employees. Detailed provisions governing the layoff and recall of employees are also contained in the contract. The captain has authority to discipline, including to (at least) effectively recommend discharge of employees, but clearly not to lay off.

Employer has a drug and alcohol policy that covers in detail the handling of a situation of a drunk (or otherwise incapacitated) person on the boat. Under that policy, the person is first to be confined for their own safety. In due course, shoreside support is called; and the person is either taken to a hospital, or driven home.

Drug and alcohol incidents are brought to Frasher's attention (as are acts of employee insubordination). Under ORCO's above drug and alcohol policy, the captain may (only) suspend an employee who is drunk pending final investigation, though if there are no other factors, a termination results. Frasher's assertions that in related circumstances the mate could tell the captain to take the boat to the nearest landing and that he was going to throw the man off the boat notwithstanding, the above policy governed the procedure involved in the handling of drug and alcohol related incidents. Indeed, to go shoreside when the boat was running, either the captain or the pilot (also a clear supervisor) had to be directly involved in the navigation of the boat there. Frasher in the end acknowledged that the mate does not order the captain (nor I find the pilot) in such a matter, which in any event is governed by detailed company policy. Although discipline imposed otherwise does not have to have Frasher's approval, he has general oversight of all discipline.

Murphy confirmed that a captain can recommend a suspension to the manager of crew personnel (at Cincinnati). Murphy recounted similar limitation existed even on the captain's imposition of lesser disciplines. Thus, according to Murphy, while the captain can also write up a written warning to an employee, the captain does not give the written warning directly to an employee, but sends it to personnel (to port captain and/or the manager of crew personnel) who will review it, and determine if it is to issue. (The mate's contended disciplinary authority is more conveniently discussed and compared late.)

Any indication of record to the contrary notwithstanding, the captain *under the contract* does have authority to discuss and adjust an employee's complaint or other matter brought to him for adjustment. (A mate does not.) If the matter cannot be adjusted satisfactorily in that manner, the matter may be then treated as a grievance in accordance with the contract's article 11 grievance and arbitration procedures.

b. *Engineers*

Frasher recounts that the chief engineer (also a previously stipulated supervisor, along with the assistant or relief engineer), can not hire and fire, and is primarily a technician. The chief engineer receives all his assignments directly at the ship through faxes sent from ORCO's Cincinnati headquarters. The chief (and assistant's) engineer's responsibilities are (essentially) limited to the engine room, and mechanical functions; and, their work has nothing to do with deck duties, or the mate.

c. *The cook*

The cook is responsible for meal preparations for the boat's complement (and visitors), and reports directly to the captain. The mate also has no responsibility for the supervision of the cook.

d. *The deck crew*

(1) *Mate*

In general, in the inland river industry, deckhand skill is learned mainly through work experience on boats, not through schooling. Mates, having worked their way up over many years, are very experienced at deck work, which many respects, at the one time, is both physically demanding and can require use of considerable skill. It appears as uncontested that to be a mate you have to have previously demonstrated certain skills generally obtained as a result of years of experience at the trade. In material times, ORCO employed 15–16 mates, though, at time of hearing, ORCO employed 14 mates, one having recently retired, and one returned to deckhand status, for unstated reason.

Murphy recounted generally that as a mate he is in charge of the deck force. Murphy thus related that he regularly directs and assigns duties to the watchman and deckhands (though he has also acknowledged that he has done so for years). According to Murphy, a mate will regularly assign the watchman and/or deckhands various duties related to seeing to it that the barges are checked for water; that the barge gunnels (sidewalks) are clean and free of obstacles; that running lights are in their proper place, and working; and that lock and various other type lines and other equipment (e.g., rigging, ratchets, wires, straps, planks, and etc.) are maintained in ready and working order.

(2) *Watchman, deckhands, and including swingman*

At least in certain other substantial part, deckhand work as well as watchman work, is skilled work. However, not every deckhand will necessarily have the ability to become a watchman. Murphy confirmed that to be promoted to a watchman, the individual deckhand employee must have over the years displayed seamanship, navigation, an ability to work with others, a lot of common sense and teaching skills.

Prior to July 1, under the expired contract, progression in the deck department was on the basis of seniority from deckhand, to watchman, to mate; though promotion was by seniority and demonstrated fitness during a probationary period. The expired agreement thus provided (G.C. Exh. 5, p. (4)):

4. Seniority shall be applicable according to the following procedures and qualifications:

(a) Promotions shall be on the basis of department seniority within the unit, provided an employee possesses the qualifications for the job.

(b) Progression in the deck department shall be:

1. Deckhand to Watchman to Mate from any classification, providing always that seniority shall be the deciding factor;

David F. Pauley has been employed by ORCO for 16 years, currently as a watchman, and within the last year twice as a temporary mate, for a 3-day period each time. Pauley confirmed in regard to promotion, that seniority alone is not enough; you have to show you can do the job during a subsequent probationary period. The current agreement provides for the same, except a reference to mate no longer ap-

pears in deck department progression (G.C. Exh. 8, pp. 3–4).

In general, the watchman and two deckhands on forward watch (as the mate and the one deckhand on after watch) continue to do the same basic work below of tying up, lashing, and pumping of the barges, and maintenance of equipment, and lines when the boat is running. However, one of the two deckhands on forward watch is designated a swingman, to whom certain jobs are also normally assigned when the towboat is engaged in more difficult tasks of landing, or double locking, as discussed next.

(a) *Locking*

At certain locations along the river, ORCO's towboat and barges in tow must pass through locks. The locks are of different sizes. In a single lock, the entire boat and its barges in tow may pass through the lock at one time. Effectively boat personnel do not have to dismantle the tow. When it is otherwise, as in a so-called double lock, passage through the lock is by partial tow; and it is a lot more complicated, and requires additional manpower.

It appears that each barge is 195 feet long. In any event, in the instance of a tow with 9 barges, the tow is well over a 1000 feet long. If the lock to be passed through is 600 feet, only three barges will be able to initially enter into the lock's chamber. A work force of three deckhands is required. The captain (or pilot) steers the boat and tow into the lock, and (essentially) a forward watch regular combination of a watchman and two deckhands, or a special after watch of mate and two deckhands (one of whom is normally the swingman), must break the appropriate barge couplings to disconnect the three barges, so the boat may then back out with the six remaining barges, thus effectively leaving three barges in the lock for initial passage. The three barges left in the lock chamber are then pulled out of the lock by cable on a winch; and the procedure is repeated as necessary.

A third man is thus required in double locking, and the swingman is normally used for that purpose, whether the double locking is to be on the swingman's normal forward watch, or is to be made on an after watch, and the swingman must work (usually additionally) on that watch.

(b) *Landing*

The boat may land the tow in a pickup and/or delivery of barges all up and down the river. Normally a third man is not required for a pickup of single barge. However, for a landing to pickup barges, or to deliver a barge(s), a three-man work force is required, again normally involving the swingman, either on his own regular forward watch, or requiring him to work in some manner on the afterwatch. (Certain barge pumping may also require a third man; and the swingman may also be used for that purpose.)

As might be expected, normally both a double locking or landing on after watch will involve overtime for the swingman. The swingman position is not necessarily a desirable assignment on that account. Locking and landing may occur on alternating watches.

Frequently deckhands do not leave a boat (end a tour) at the same time. Ordinarily a relieving deckhand will take the watch of the deckhand being relieved. Apparently otherwise, at least in the past, on arrival of the deckhands on board, the

captain would assign deckhands (other than the swingman) to their watches. By contract terms, the swingman deckhand position is subject to bid on the basis of seniority, with provision effectively made that if there is no bid on it, the least senior deckhand has to take the swingman position. In the case of dispatch of a probationary deckhand employee to a towboat, the probationary employee (absent bid of more senior employee), under the contract's terms, would be assigned to the swingman position.

When the towboat is locking or landing on after watch particularly additional help is required. In that instance, certain varying watch assignments may be assigned the "Swing Man" as provided for in the agreement. Thus the current agreement (G.C. Exh. 8, sec. 9(b), p. 11) provides relatedly, and pertinently:

(b) The "Swing Man" position shall be offered in [sic, but in context on] the basis of seniority, and shall be assigned to the least senior Deckhand if no other Deckhand selects this position. The working hours for the "Swing Man" will normally be twelve (12) hours divided into two (2) watches of six (6) hours each from 6:00 a.m. to 12:00 noon and from 6:00 p.m. to midnight. *This designated twelve (12) hour period may be varied at the discretion of the captain to meet locking and dock conditions.* Such varied work periods may be to an earlier or late start time or to a straight twelve (12) hour watch. Work in excess of twelve (12) consecutive hours regardless of whether such hours are worked during one or more days will be compensated at double time and one-half. No more than sixteen (16) hours work will be required in any twenty-four (24) hour period and a rest period will be minimum of eight (8) hours. If such eight (8) hour rest period is not granted, the "Swing Man" will receive overtime payments for those hours worked in excess of sixteen (16) hours and also be given compensated time off for an equivalent period after completion of the subsequent eight (8) hour rest period. *An off duty crew member may be called out at the overtime rate if assistance is needed during the "Swing Mans" [sic] rest period.* [Emphasis added.]

While it is the responsibility of the mate to see to it that all deck work is done properly, much of the work is basically routine work to watchman, and experienced deckhands. Thus, the mate continues primarily to routinely direct the watchman and deckhands (as may the watchman routinely direct the deckhand) as to what he wants done, along with doing the very same work himself.

E.g., cleaning barge gunnels is basically physical work (shoveling) and is routinely performed by mate, watchman and all deckhands. Thus, the established practice is that on first watch out of a landing, though only to be done in daylight hours, forward watch crew routinely cleans port gunnels, and after watch crew cleans starboard gunnels. Normally the watchman and experienced deckhands will know what to do in this, and other such routine tasks.

All three will thus regularly check the boat's running lights; pump water (when required) from a barge; ensure the security of all barge couplings tightening them as required; and ensure that the appropriate lines are in place for any upcoming locking (or landing); and, all perform routine sea-

sonal maintenance (e.g., chipping, scraping and painting). It is similarly the responsibility of the captain, the mate, and the watchman, but also of the deckhands (with the experience to do so), to make sure that the barge(s) is (are) properly fastened at a landing in a safe manner.

In the case of a new deckhand who has limited experience, it is the mate's responsibility to train the new deckhand to do the work in a correct manner. According to Murphy the captain will hold the mate responsible, if he has not. The mate may give instruction to a watchman in regard to the training of a new deckhand. An experienced deckhand may also help train a new deckhand, by direction of the mate (or watchman), or on his own.

6. The mates

The prior mate dispute and late inclusion

Inclusion of "mates" in the bargaining unit was an issue first disputed in 1962. While in agreement with the parties in excluding masters, pilots, chief engineers, and assistant engineers as supervisors, the material facts were then pertinently concluded on disputed categories in the Decision and Direction of Election (DDE) dated March 29, 1962, as follows:

The record reveals that the mates and watchmen are the leaders of the deckhands and as such they direct these employees in the work of tying up, lashing, and pumping of the barges, and in maintaining the equipment. The mates and watchmen spend approximately 100 per cent of their working time in the actual performance of the same duties as the deckhands. The duties of the mates and watchmen are the same, except the watchmen have the additional duties of keeping track of the broken rigging, pumps and equipment, which involves some paper work. The record reveals that neither the mates and watchmen have any authority to hire, fire, recall, discipline, or to effectively recommend such action. Because of longer years of employment and greater experience, the mates and watchmen routinely assign work but do not responsibly direct the employees by the use of independent judgment. Accordingly, I find that the mates and watchmen are not supervisors within the meaning of the Act and I, therefore, include them in the unit found appropriate herein. [See *Proctor-Silex Corp.*, 131 NLRB 57 (1961).]

7. The contended changes in mates' duties, developing assignments, and related events

a. The Paducah screening and hiring process

Frasher related that mates from all divisions are now involved in the application, screening, and hiring process at the Paducah facility. In that regard, Frasher has related that ORCO enhanced the duties and responsibilities of ORCO's mates, by injecting the mates into its hiring procedure, to the point they (mates) now approve the hiring of employees, in that the mates now first select the candidates for hire; and later, through evaluation of probationary employees, the mates (essentially) determine employees to whom ORCO offers permanent employment.

Broadly viewed, the (new) role of the mate in the Paducah facility's part in ORCO's hiring process was to evaluate an applicant for employment as deckhand, who usually was without any river experience. The initial assessment was made on the applicant's: general deckhand attitude; ability to learn quickly; and to demonstrate (deckhand) skills in a natural way; or in a way that would indicate the individual could be trained (in them) further. The mate also became more formally involved in a later evaluation of probationary deckhands.

The training of new, or probationary employees occurred later on the boat. The mate was made more formally involved in that training function, which expectantly involved training corrections. However, in contrast, the mates are now also contended to be authorized to engage in discipline of deckhand with exercise of independent judgment, though such mate discipline authority is a contention advanced with little or no evidence offered to support the exercise of it.

Though Frasher has asserted that the captain is not signatory to either a mate's (newly) assigned authority to evaluate, and discipline deck department employees, subjects to be discussed further below, Frasher in that respect has otherwise acknowledged that he (Frasher) had limited knowledge about the mate's use of written documents in ORCO's screening candidates for hire. In that regard, a formal hiring evaluation form to be filled out by the mates did not come into use until February, though ORCO mates had begun taking part in the screening and hiring process at the Paducah facility much earlier, starting in July 1988.

In contrast, the mate's probationary deckhand evaluations written in September 1988, and (essentially) up until September 1989, far more often than not had the captain's signature along with the mate's (as well as an occasional watchman's) signature. The deckhand evaluation form that was used by mates for probationary employees starting in September 1988 and that was in use until September 9, 1989, was an evaluation form described as in prior use by the captain for regular deckhands. Seemingly, it even then had provided a place for a mate's signature. In contrast, the form placed in use on September 9, 1989, and thereafter made provision for an immediate supervisor's (in lieu of mates) signature.

b. The March 1988 meeting with mates

In March 1988, Employer held a meeting with all of its mates at Huntington, West Virginia. Frasher relates that Employer discussed (generally) at that time the role that ORCO wanted its mates to thereafter play in its (deckhand) hiring procedure. According to Frasher's uncorroborated assertion, from the time of that first meeting when ORCO introduced its mates to the orientation concept, ORCO told the mates that as far as ORCO was concerned, the mates were then supervisors.

All prior expired agreements have traditionally covered "mates." E.g., there is no question from the face of the 1986-1989 contract in evidence and employer-related concessions, that mates were covered by that collective-bargaining agreement through its expiration on June 30. Indeed, Employer never (formally) disputed with the Union that mates were part of the recognized unit, until March (1989), when Ferguson first notified the Union that it would terminate the existing agreement, and that ORCO would not any

longer bargain for mates who were now (contended) supervisors, discussed further below. (Murphy confirmed that the first time that he became aware that the company actually wanted to eliminate the mate classification from the collective-bargaining agreement was Ferguson's letter of March 5.)

Frasher otherwise asserted that after the March 1988 meeting, the mate had the responsibility and authority for the hiring of new employees. Frasher also said, and I conclude and find he *more accurately* then recounted, we told them of the deckhand orientation program; that thereafter they were to go to the Paducah facility, on a selected basis, and participate in the screening of deckhand applicants; and the mates were also told they would be expected to evaluate probationary employees for permanent employment.

According to Frasher, prior to this, the mates had had no authority or responsibility in these areas, but after the March 1988 meetings, the mates had both responsibility and authority for the hiring of new deck employees. But Murphy has recalled that the first time that he evaluated a probationary employee was 10 years ago; and though he had not done so again in the interim, Murphy also testified, perhaps even the more revealingly in regard to the captain's reliance on the mate (and watchman), that the captain had thereafter made out the evaluations of probationary employees, but after receiving an input from both the mate *and* watchman on the employee.

Frasher also related that they had discussed other management type topics with the mates in the March 1988 meeting. The agenda of the meetings held separately with the mates at Huntington, West Virginia, in March 1988 is in evidence. The agenda reflects only that there was: (1) a 45-minute talk by Frasher on safety, operating problems, the (above) subject of new employees hired, and ORCO's operating priorities. (Frasher summarized ORCO priorities were established at that time, namely: in personal safety; equipment safety; operating efficiency; and administrative paper handling responsibilities.) There was also: (2) a 45-minute discussion by Noble on safety programs (including the establishment of a formal monthly safety program); and (3) a 45-minute deckhand orientation program presentation by Reigle. (Neither Noble or Reigle have testified in this proceeding.)

Frasher described ORCO's deckhand orientation program presented by Riegel as encompassing a video presentation of what they were telling applicants for employment were the roles the mates were playing. According to Frasher, Riegel explained the mate's role, which was to explain to the candidates what would be expected of them in terms of hard work and skills; to see if the candidates would catch on; and, to assess the candidates physical skills, and general attitude toward deckhand work and the Company. (The video presentation itself however, was not produced in evidence.) There was otherwise (4) a 45-minute EEO program (review of the law) presented by Ferguson; and (5) a 90-minute general panel discussion. A copy of the agenda was given to the mates, put was not provided to the Union.

Frasher has acknowledged that Employer at the time was looking at its present and future needs, thus testifying, we knew opportunities for promotion were going to develop in our division with many management people retiring, e.g., captains and pilots, and even mates. When hiring need accelerated, ORCO also recognized that it was important to upgrade the training skills of its mates. But mate training of

new employees is not something that was itself new. There is normally a 15–20-percent employment turnover.

c. A port captain established

In May 1988, ORCO promoted Captain Ray Thornton to be a port (shoreside) captain, with assigned responsibility to assist the captains and mates in the educational and training processes of what ORCO was trying to accomplish. The boat captains thereafter regularly reported to Thornton, who is located at Huntington, West Virginia, which is the center of ORCO's river operations.

According to Thornton the captains had complained in the past at masters meetings of being overwhelmed with increased Federal laws requiring close supervision of the crew, as in ensuring conformance with pollution control laws and other type paper work. Thornton asserts that he took his job of port captain with Employer's general understanding that Thornton was going to seek to transfer some of the captains' duties to the mates.

On promotion, Thornton visited all the captains and mates in an initial 45-day period, asking the captains what he could do to help them the most; and where they felt they could use some help first. Thornton relates that there were already (before 1988) about four or five mates who had taken over some of the responsibility for their captains, but quite a few more mates had told the captain it was not their job. Later that year, in July, selected ORCO mates (apparently) on Thornton's recommendations of being well qualified to do so, went to the Paducah facility and participated in the screening and hiring process, in the manner to be next described. From the start, Murphy was a principal participant, as is also made clear below.

d. ORCO mates' participation in the screening and hiring process in July 1988

Every applicant or candidate for employment by ORCO goes through a several step screening process. The screening process begins with the prospective candidate's submission of a written application to ORCO's personnel department, in Cincinnati, Ohio. A company recruiter (previously Pam Pellegrini, and now Terry Yother) in the personnel department next reviews and contacts all the applicant's submitted references; and, the recruiter then conducts an interview of the applicant.

The candidate must next successfully complete a medical examination, including a drug screening test. Before being actually hired, the applicant is then required to successfully complete the 2-1/2-day orientation program that is conducted for all candidates for employment at the Employer's training facility at Paducah, Kentucky. Finally, the employee must successfully complete 60-day probationary period of employment to obtain permanent employment with ORCO.

At the Paducah facility, there have been 9 and 10 such orientation classes held in the past 2 years, respectively, but not exclusively for ORCO. The roles of the mates in other divisions were identical with the roles of ORCO mates. The first deckhand class involving (in part) ORCO mates and applicants for ORCO employment occurred in July 1988.

Several days prior to an orientation class, the recruiter gives a list of candidates to Brown. In general, a very small percentage of candidates for employment will have had any

river experience. In the orientation and evaluation phase, prior to initial hiring, a group of 2–6 candidates are assigned to a mate, and the mate essentially shows the candidates the kind of work that will be expected of them.

The mates, who are to participate in the screening process, have a training session of their own before each orientation class. At that time they are given detailed instructions as to what they are to do. The candidates are informed at the outset of the orientation program that the mate will be evaluating them for employment.

To the extent Frasher has testified that the mates did not evaluate candidates for employment in writing, he is correct in his understanding only through February (1989). Training director Brown testified (and I find that it has been so at least since February 8, 1989, when the form first came into use), that the mates are told they have the responsibility to make the initial hire decision fairly and justly by use of a provided candidate evaluation form. Frasher testified significantly otherwise, at least as to the initial period of mate participation in the orientation program and evaluation of candidates for employment, that the (involved ORCO) mates conveyed their assessment of candidates to each other; that one mate could have another mate check to see if that mate saw what the first mate saw; and Brown testified both credibly and revealingly otherwise that though Brown does train a mate how to train new deckhands more ably, he does not train a mate how to evaluate a candidate. Frasher as significantly acknowledged (however reluctantly) that a portion of the mates' experience was used to assess whether to offer the candidate employment.

On the first day of the candidate's orientation, there is some classroom work in boat safety and deckhand basics at a small table in a large classroom; and, later that day (or the next) the mate(s) take the candidates out on a (stationary) boat and/or barge for more hands-on basic orientation. (Some mates are just responsible for the readiness of the equipment for appropriate demonstrations.) Starting on the second day, and lasting through the third, the mates conduct a tour of the entire boat, and then provide the candidates with additional on-the-job demonstration (e.g., with lines), hands-on training and opportunity for emulation, with gravitation then to a visit of a barge tow line across the river, for observation of basic deckhand performances on a running towboat operation.

Although Frasher stressed that the mates' participation with applicants at the Paducah facility was not a training program but rather (in context, and I find) a continuation in the applicant screening process in the Employer's employment program, there is some limited hands-on training that does take place. The hands-on training is then functionally observed by the mate both in regard to initial assessment of the applicant's demonstrated ability to follow instructions and do the deckhand work, with indications also being observed of trainability and attitude as well as physical dexterity and strength in doing deckhand required tasks. On hire, the successful candidates are dispatched to boats as probationary employees, the first arriving as such on ORCO boats in August 1988.

e. Thornton's letter of August 24, 1988, to captains and mates

The orientation phase is fairly to be contrasted as involving minimal training emphasis when compared with the

training of probationary employees that occurs on the boat thereafter. On August 24, 1988, Thornton issued a letter to captains and mates that summarized: the previous absence of any hiring over the past 10 years because of the loss of boats and downsizing of crews in ORCO's division; the recent reversal of those conditions in the addition of another vessel and hiring of new crew members; the recent discussions he had with them about problems being experienced in day-to-day vessel operations; and his intent to address the problems thereafter through correspondence.

At this time Thornton's letter urged all the captains, "to impress on the mates that they are responsible for managing Deck Department and reporting to the captain on a daily basis." Enclosed material covered: on new hires, the mates responsibility for training new deckhands, with emphasis placed on safety items, on board orientation, and deckhand manual study; *evaluations, with the captain to initiate them, the mate to complete the form, consulting with the "leadman" (watchman) when appropriate and notably mate discussion with the captain to be held before the mate conducted a formal evaluation with the employee, with option of the captain to attend; and with direction that both the captain and the mate sign the (probationary) deckhand evaluation form then made available in or use in the evaluation of probationary employees, as distinguished from candidates for employment.*

The correspondence also covered the mate's assigned responsibility in investigating injuries and filling out injury forms, which Thornton had pushed since hired, because the mates were, "more closely associated with some of the area where injuries may occur," but again (even then) with both captain and mate asked to sign the injury form. In general the burden for timely completion of the form fell on the mate; but the captain remained fully knowledgeable about the reports that were submitted to crew personnel from the vessel. In actual practice thereafter, normally the captain and/or pilot signed the injury forms along with the mate, though a watchman has also made out an accident report on an incident on his watch, that was then signed by his superior, other than a mate. There was no emphasis placed on mate discipline of deckhands at this time.

During the probationary period, Frasher's understanding, and ORCO's stated existing policy intention was that a probationary employee would be evaluated at least three times (once every 20 days), by three *different* mates. ORCO's policy thus anticipated that during an employee's 60-day probationary period (which may extend over a 90-day-or-more calendar period) the probationary employee would be dispatched to three different vessels, and the probationary deckhand thus work under and be evaluated by three different mates (and captains). However, the required relief and reassignment after 20 days, to accomplish the policy of three different mate reviews was (essentially) not provided.

f. The September 1988 meeting

On September 6-7, 1988, the mates attended another meeting at Huntington, West Virginia, at which time they were given a manual (one revised in February 1989), to assist them in training the probationary employees on the boat and to assist them in the evaluation of probationary employees (revised again in that latter regard in June 1989).

In this meeting, a *regular* deck and evaluation form (previously in use by captains in evaluating regular deckhands) was put on an overhead (projector) and discussed for use by the mates in their evaluation of the probationary employees. The form (then) with provision for mate and captain's signature, was used as early as September 25, 1988, for about a year. (On September 9, 1989, the form was changed to provide for a signature by an "immediate supervisor" in place of the provision before for a mate's signature.)

According to Frasher, the preponderance of this meeting's time was spent on deckhand training and mate evaluation for the purpose of the mate's recommendation on permanent employment, but notably again delimited, *as far as their working experience, skills, and attitude towards safety.* Brown related that as (then) safety coordinator he was involved in developing the mates' training skills so they would be able to the more effectively implement the on board training of the new deckhands.

The "Mate's Guide to Deckhand Training" manual

In September 1988, ORCO (and its divisional) mates were supplied a "Mate's Guide To Deckhand Training" manual that had been developed by ME and/or Brown. Brown candidly acknowledged that Employer recognized when it began to accelerate hiring because of need, that it was important to upgrade the skills of its mates in training the new deckhands, who generally had limited, if any river experience. The manual's purpose was to serve as an overall guide; to establish training responsibilities; to plot out a plan for training the deckhands; to improve supervisory training skills; and to ensure consistency in deckhand training.

The manual covers various training aspects of, and provides breakdowns of the particular deckhand job in detail, e.g., with directions to show the new employee how to, and then observe the employee perform particular deck tasks; with subject coverages provided on desirable orientation procedures; boat tour direction; skills training; use of ratchets and manual winches; laying wires; facing boat to tow; unfacing from tow; exposure to tow equipment; emergency preparedness; line handling; locking; navigation assistance; and tow work.

The manual also provided rules for a good (probationary) evaluation that stressed mate evaluation (again) of *skills, knowledge, and attitude*, not personality or appearance; and, at least at this time, *specifically provided for a review (of the evaluation) with the captain before a mate's review with the employee was accomplished.*

Brown relates that a copy of the manual was not given to deckhand, or watchman, though Thornton's prior letter indicates there was deckhand access to a deckhand manual for study; and, Frasher's followup letter that month to mates stated they could have more copies the "Mate's Guide to Deckhand Training" manual, if they needed them.

g. Frasher's followup September letter to mates

On September 19, 1988, Frasher sent a followup letter to each mate. In the letter Frasher additionally stressed mate vessel management in terms of *safety and the development (again), of a well trained, skilled work force:*

SAFETY is of first importance in the discharge of duty. A well trained, skilled workforce is the foundation of

a safe and efficient operation. You, as a vessel manager, have a responsibility for developing a workforce

Notably, Murphy related that at the training sessions he attended they were told that they were going to have additional duties as a mate; but he was not told at that time that he would get any additional pay or benefits.

h. Mates evaluation of candidates for employment and the evaluation of probationary employees

The candidates for employment, at the Paducah facility may be evaluated by a number of mates, but the frequency with which that may occur is not made apparent of record. It is clear that Employer intended successful candidates to be later evaluated as probationary employees by *three different* mate during the deckhand's probationary period, thus with intended preliminary review by three separate captains, and a final review by Thornton, as explicated below.

In times prior, all the management burden had apparently fallen on the master. Presently, though the captain has no apparent role in the initial hiring process of candidates at the Paducah facility, on the boat, the captain has retained line authority over the mate, and responsibility for the boat and its complement. Notwithstanding any Frasher assertion to the contrary, I credit Thornton's August 24, 1988 letter as more accurately depicting the controlling part the captains were expected to continue to play at this time.

Though according to Frasher, the captain does not now necessarily sign an evaluation, whenever one was thereafter written up, as evidence thereof has been submitted in this record, the captain almost always did, more in keeping with Thornton's direction, including mate initial review of evaluation with the captain. The evaluations are then forwarded to crew personnel in Cincinnati, who forward a copy to Port Captain Thornton. More precisely, when Crew Dispatcher Judy Stroh receives a probationary employee evaluation, she makes copies, and sends a copy to Thornton, who keeps them on file, along with any discipline records on the probationary employees that may be sent to him. No such disciplinary record(s) from any mate(s) were submitted in evidence.

Frasher was unaware of any instance where the recommendation of the mate (seemingly) on initial hire of candidates for employment was not followed by crew personnel. Frasher asserted that the crew personnel (approval) was only a rubber stamp to the recommendation of the mate. In any event, Brown has confirmed that result as to initial ire of candidates for employment.

Although Frasher had limited knowledge about written documents used in the orientation phase of hiring, at that point in the screening, initial hire of a candidate for employment is clearly enough based on the mate's decision. Brown corroborated that of 60 applicants reviewed by 9 ORCO mates since they started involvement in the hiring process in July 1988, all 47 recommended for initial hire by the mates have been hired, and all those not recommended for hire have not been. Moreover, Brown confirmed that now (since February 28), the mate does fill out a company-developed written form on it, with a recommendation for hire, or not (albeit with acknowledgment it was deliberately kept simple.)

Brown is currently the training director at Paducah, with assigned responsibility to implement, monitor, and maintain

programs to fulfill manning requirements. Previously employed as safety coordinator since 1985, and as such in the material period of 1988 through February 1989, Brown had similar oversight responsibility for the orientation program at Paducah. Brown testified credibly that the formation of a candidate evaluation form was completed in February 1989, and it was used thereafter by the mates. Twenty-three such forms are in evidence, the earliest being dated February 28 (1989), and the last September 12.

Since February 28, an ORCO mate thus presently rates an applicant (in writing) as good, fair, or poor in nine employer designated areas: safety practices; desire to learn; interest/questions; follow directions/orders; initiative; coordination/balance; strength; fitness; and promptness. (Brown testified the form was designed to be simple.) If in doubt, a mate may discuss an applicant's evaluation with the port captain (if there at the time), or a member of crew personnel, or another mate who is there. (The port captain has only been there twice. Crew personnel is always there.) If an applicant does not pass orientation, the applicant is merely informed that the applicant has not passed all of the criteria, and an offer of employment is not extended. An applicant assigned to and evaluated by an ORCO mate, is not necessarily always employed by ORCO. Indeed on one occasion, a successful applicant assigned to an ORCO mate for evaluation was hired by another division.

Murphy recalled that he participated at the Paducah orientations six times, the first occasion being in July 1988. Since commencement of ORCO mates' involvement in the screening and hiring process in July 1988, Brown testified credibly that 60 candidates have been processed, and 47 have been hired as probationary employees.

In comparison, Murphy has evaluated 24 (of the 60) applicants, deciding 21 (of 47) candidates should be hired, who were hired (as probationary employees); and, deciding that 3 (of 13) should not be hired, who were not hired. As also noted, candidate evaluation forms did not come into use until February (1989). Only 23 have been submitted in evidence, of which 6 are Murphy evaluations in May and June. On that occasion Murphy evaluated four for hire and two not. Both nonhires were effectively self-washouts for travel and other reason(s), though a mate has washed out a candidate for safety attitude reason.

In 1989 only five other mates had participated in written evaluation of the candidates for employment. However, only mate Richard Thomas had evaluated candidates in writing before the March notice to the Union, and he only after Employer's earlier February meeting, all on February 28. Thomas evaluated four for hire and one not. The only other evaluations in 1989 for nonhire were from mate Buddy Newman's five evaluations made much later on September 12. Even there, one was because the candidate did not meet a physical strength standard; another one was effectively a self-wash because of an inability to read; and the third had exhibited a know-it-all attitude. In two separate instances (by separate mates) a candidate was evaluated for hire though there was initial notice made by the mate of contrary strength and health considerations.

Even in the broader period for which there are written evaluations of probationary employees from September 25, 1988, through September 9, 1989, Thornton received and reviewed only 23 deckhand evaluation forms submitted on but

18 deckhands, apparently 17 of which recommended employment of probationary employees. However, 13 of the 18 employees were evaluated only once in writing; and five employees were evaluated twice. In contrast with Employer's policy expectation, only 18 of 47 hired were evaluated, and none of these employees had 3 evaluations.

In contrast with his purported letter of July 18 (1989) asserting deck crews were fully aware of the supervisory responsibilities and authority of their mates, Thornton offered in explanation at hearing that he is in a training mode with regard to the mates; that some of the mates don't follow instructions. Thornton otherwise acknowledged that most of the time it does not happen that they have three evaluations of the probationary employees; and indeed that the 23 deckhand evaluations in evidence were all that he had (ever) received. In the end, Thornton conceded the deckhands on probation weren't being evaluated by mates (or captains) as often as they were supposed to be under the procedure ORCO had initially established.

Nonetheless, Thornton testified that dispatcher Stroh regularly notifies him whenever a probationary employee is about to be dispatched out to a boat at a time when the employee will attain permanent status. Thornton testified that he then reviews the deckhand evaluation forms that he has on file; and he notifies Stroh whether permanent employment status is to be extended or not.

The written evaluations in evidence frequently contained mate remarks, albeit variously stated, on the one hand, on the employee's willingness to listen and/or follow instruction and/or observation that the employee learns fast; and otherwise, in frequent explanation of low marks that the probationary employee has received, that the employee had simply not been exposed to certain work/duty, and/or all the employee needed was more time, and/or given time the employee will make a good deckhand, or a good man for the Company. However, areas of deficiency also do appear noted.

Though early and frequent general observation was that in areas marked low the employee needed to work on and/or improve in all areas, general remarks ranged from observation that the employee had no desire to work (though the related evaluation not to hire was one reversed by Thornton in this instance), to he needs to take more interest in his job; to more specific evaluations, but *notably in July (1989) and thereafter*, that the employee lays back and its for someone else to do the job, and the employee would not do a job right unless you stayed with him completely through the job; to blunt observation the employee is brand new and does not know anything about rigging, tow equipment, or line handling; to a more definitive training area observation that the employee has a little trouble laying wires, etc., and is a little slow catching on in the shifting and picking up of barges; to an observation that this man has worked 11 days and his docking skills (are) that of someone who has been here 6 months; that he will make a good deckhand; and that he needs to work with a mate that will teach him.

Frasher asserted that the mates have responsibility now to evaluate the watchmen and regular deckhands. Frasher's other varied assertions in regard to bits and pieces of a prior annual review program existing, and being one that was purportedly reintroduced as a company policy in February, followed by continued acknowledgements that there were not

then periodic evaluations going on; and mates were not performing them now, was simply too disjointed and strained for me to credit. Murphy's related assertions were hardly any more convincing.

Murphy has related that he evaluated three individuals who were not probationary employees at the time; though he could not then recall their names. The claimed circumstances were that one deckhand had told Murphy that he was due for an evaluation (in a program which, at best, Frasher had conceded had fallen into disuse); and, another said that he had never been evaluated. Murphy simply asserts that he prepared the evaluation, showed it to the captain, who signed it. Murphy acknowledged that the mates' evaluation of watchmen was not discussed in September 1988; and also acknowledged that no one had told him to evaluate the regular deckhands, let alone the watchmen. I did not at the time, nor do I now on review of the record find this evidence offering very convincing; and, I do not credit it.

In contrast, Murphy had written a letter with an evaluation of a deckhand that he had worked with off and on over a period of 20 years, recommending the individual for promotion to watchman. The recommendation is in evidence; is unrefuted, and I credit it (as far as it goes). Moreover, the individual was later promoted.

However, no other evidence appears presented that any other mate has ever recommended an individual for promotion; let alone that the recommendations were followed. Indeed, as noted, the contrary is more indicated since by related contract term (and apparent practice thereunder), a deckhand's promotion to watchman, all things considered, is to be by seniority, with the promoted employee required to later demonstrate that the employee can do the job during a probationary period.

Consideration of Murphy's (and their mates') effective recommendation on selection of candidates for probationary employment; and on permanent hire of probationary deckhands (and Murphy's above recommendation on promotion) under the above circumstances presently set aside, and reserved for analysis below, it is clear enough that final determination on permanent hire of a probationary employee in each instance is being presently made by port captain Thornton.

This is most readily observed on occasion where there is a conflict in the mate's evaluation recommendations for permanent employment. Thornton has called and discussed a mate's earlier evaluation not to hire the probationary employee to determine the degree that the mate was strongly against permanent employ of the probationary employee. However, when the mate thereafter held to his evaluation, Thornton (effectively) reversed that recommendation, and followed another recommendation (evaluation) for hire, with which Thornton more agreed.

Moreover, when there was only one evaluation submitted, as (at best) there far more frequently was (if there was a written evaluation on a probationary employee at all), and when Thornton concluded it was appropriate to do so Thornton called dispatcher Stroh to determine what other mate (if any) had also had an opportunity to evaluate the probationary employee. Thornton explained the reason that he frequently did not have (even) two mate evaluations was usually because the second mate had had occasion to view the individual at work for only 5-10 days. Wholly apart from failing

to have the anticipated number of diverse evaluations on a given probationary employee, the fact is, Employer has received evaluations on only 18 of the 47 probationary employees hired, or less than 40 percent.

In any event, Thornton on his own has called another mate for additional input into the (his) permanent hire decision. In further explaining his own actions, Thornton revealingly said that he feels more comfortable with some mates' evaluations. Thornton has thereby effectively confirmed that it is his own exercise of independent judgment on evaluation forms, such as have been submitted, that is being brought in to play in the hiring decision process on extending permanent employment.

Indeed, Thornton will on his own also contact the personnel department for any additional input that they may have on a determination to extend permanent employment. Thornton testified that he has also contacted captains in such circumstances, though only once or twice. Thornton has never contacted a watchman. However, in explaining that was because Thornton *expects the mate to have already entered that (input) based on the watchman as lead senior deckhand*, Thornton has effectively revealed the continued evaluation input of watchmen based on their experience. (ORCO's watchmen have more than a 5-year minimum of experience, and some considerably more.)

Indeed, Thornton acknowledged that a probationary deckhand's evaluation may be, and has been also signed by a watchman, at a mate's request. In that regard, Murphy confirmed one such occasion when a captain had disagreed with one of Murphy's rating as being too high. Murphy had then asked for the watchman's participation. When the watchman agreed with Murphy, the rating was not changed.

In summary, Thornton has acknowledged that he has obtained information from as many sources as he can, though he particularly does so when he is letting a probationary employee go. (At that point the Employer has a substantial process investment in each probationary employee.) Thornton knew that there were a couple of the probationary employees who were fired at the end of the probationary period, though he could not recall their names.

i. *The February (1989) meeting(s)*

(1) Job descriptions, authority revisions, and package material

On February 7–8, eight mates attended another meeting at Huntington, West Virginia, a meeting attended in past years by the captains and pilots *exclusively*. Frasher asserted that the reason they all got together this time was because of the confusion in the past about what was said.

Eight mates (those on shoreside attended this meeting before going back on duty. (The seven mates then on duty later attended a similar meeting held on February 14–15.) During this meeting the mates received a packet of information, including a mate job description. Thornton informed the mates that the supplied mate job description was a working document; and, the needed the mates input on changes they wanted to make. (Prior to this time the mates had had no job description.)

In the February meeting, Thornton reviewed the master's job description in relation to the pilot and the mate. The captain's job description was shown on a view graph. The pilot

and the mates had their own job descriptions, with which to follow. The mate's job description was changed, effectively (re)formulated as a result of this meeting. Frasher recounts it had taken a year to evolve the mate's job description from the masters' input. The mate's job description as revised was sent out in early March to all captains to review with employees. (No copy of either mate job description was ever provided to the Union.)

Notably, a package of material was handed out to the mates. The package contained a job description for mates, which as later revised (in March), covered the responsibilities of the mates in safety, navigation/seamanship, communications, and supervision. The package also included an effective discipline guideline sheet; a conversation (discipline) record form (of which Union was also not informed).

(a) *Supervision*

Materially, in regard to supervision the mate's job description *now* (as revised in March) provides:

IV. SUPERVISION—METHOD

- New employee orientation
- conduct training (job)
- maintain good employee relations
- participate in deck crew discipline
- participate in deck crew evaluations
- support company policies and procedures
- resolve problems
- assist in selection of deck employees for promotions and or permanent employment

The mates' job description, as revised, was sent to the captains, who, according to Frasher, were instructed to review it with the crew, and then post it. Frasher did not know if it was ever posted. Thornton's cover letter of March 3, requested only, "Please hold meetings with all your crew, and read to them the attached job descriptions of the captains, pilots, and mates." (A job description has not been formulated for a watchman, or regular deckhand.)

The revision differences (other than in supervision above), essentially were: the mate would henceforth *conduct* safety drills, training, and certain inspections (that previously fell on the captain); the mate was made responsible for completion of the quarterly vessel inspection worksheet, though other departments (e.g., pilot house, engineering, cook, etc.) were still responsible for their own substantial informational inputs. The mate was otherwise made responsible for timely completion of the form; and for taking any (safety) remedial action that might be called for by the activity sheet (e.g., showing a materiel absence, or deficiency).

The mate was assigned the responsibility for the initial conduct of investigations of accidents and injuries. The mates' responsibility for accident investigations, was to determine why an accident occurred; and to conclude and recommend how the accident could be prevented in the future. As noted, a watchman has also filled out the form, without mate involvement. These changes were otherwise reasonably shown of record to be primarily an effect of Frasher's change in ORCO's priorities to safety as being number one; and Thornton's desire to lift some of the existing paperwork burden off the captains.

(b) *Conflict in the mate's alleged new authority: in the assignment of watches and overtime*

Under Navigation, mates were assigned responsibility to "maintain proper deck watches." Frasher asserts this was stated in recognition of the mate's responsibility now for assigning people to work where they were needed, including authorizing work to be done on overtime when needed, things that normally had fallen on the captain.

As noted, aside from the swingman, previously the captain had occasion to initially assign deckhands to forward and after watches. Frasher related that the mate now (also) has some discretion, as when he may have one to two new employees on board; and he has to assign the remaining deck force so he would have a mix of new and experienced deckhands to get the job done.

Murphy confirmed that prior to 1988, the captain would assign a deckhand to a watch, and the mate does so now. However, Murphy then gave an example and explained it in terms where the contract's terms clearly come into play.

Murphy asserts that he has assigned a watch to a deckhand. Murphy recalled the occasion as one involving a double lock on his watch. On that occasion, the boat had two new, or green hands, one of whom was on Murphy's after watch, and the other (necessarily) the swingman on the forward watch, who normally would have been the third man to work on the locking. Thus, Murphy would have had the two new, or green hands working on the locking. Murphy recounts that on that occasion he picked the (other) forward deckhand to make the locks because more experienced (and, necessarily more senior).

In contrast, on this record a watchman has faced the same circumstance and asked a captain and mate for the more experienced deckhand, whenever he had an inexperienced deckhand on a double lock. However, the record does not reveal whether on the occasion(s) that the watchman asked the mate, the mate had made the change on his own, or asked the captain and was authorized by the captain to do so. The mate never told the watchman that he had the authority to change a watch.

Murphy asserted that deckhands, other than the watchman (who is always on forward watch) have no seniority (e.g., for selection of their watch). The seniority rules in the agreement however, at least in substantial part appear to govern the assignment of at least certain watches, and duties. E.g., as noted above, the swingman position is explicitly governed by the seniority provisions of the contract. Essentially, the swingman can be worked on another watch, in order to handle locking and landing phases where more manpower is needed, only with specific authority of the captain to change a swingman's watch in the instance of warranting lock and dock conditions; and seemingly makes provision for use of other deckhands only in required swingman rest period. Murphy conceded that the mate cannot change the terms of the contract.

Although Thornton has testified that he hoped the captain would give the mate his authority to change the shift of a swingman, as provided in the contract, Thornton also testified candidly that in the past, a man coming to the boat would take the watch of the person he was relieving; and if held to that, they would have to go by the contract.

Seniority provisions also govern the handling of overtime, which on this record, is shown normally involved in a lock-

ing. Under the apparent terms of the contract, even with use of a swingman, overtime must be authorized by the captain. The contract also required it to be first offered to the senior qualified employee, though not to exceed 6 hours in a shift. Murphy's purported selection of the more experienced (senior) employee in the above described circumstances was thus in apparent keeping with the contract's (only) authorized captain's power to change a deckhand's watch in such circumstances, whether or not it also as usual (by contract term, or established routine practice thereunder) involved the captain's additional required authorization of overtime to the most senior deckhand under other provision of the contract.

The captain regularly maintains overtime sheets. On request, an overtime sheet is supplied by the Company to the individual employee, usually the swingman (and cook), who may keep track of his (their) own overtime. However, Murphy confirmed that the employee has to present his overtime sheet weekly to the captain *who authorized it* (the overtime); and it also has to be signed by the captain.

It is clear that an authorizing captain still has to sign off on all the overtime he has authorized, including that normally to be expected to arise with locking, and it appears also reasonably clear under the terms of the contract that (only) the captain still has the related authority to change a deckhand's watch in the above locking conditions. There is no evidence presented that a mate has ever changed any other deckhand's watch in other locking or docking conditions, let alone has done so otherwise.

(c) *Authority to direct the work force*

Frasher was less forthcoming (and consequently least convincing) in his assertions about the manning of watches. Frasher asserted that the mate assigns the work to be done in the forward watch, though Frasher then did not know if the mate supervised a forward watch double docking; nor did Frasher even answer directly if a mate normally had no watchman on his own watch, asserting only generally that the watchman was where the mate told him to be. Employer has also asserted that during a tow emergency (e.g., a double locking under any condition, and a single locking under hazardous conditions) there may be as many as three deckhands working on a watch. Some of Frasher's assertions as to manning, and in regard to the mate's supervision of the watchman was simply too strained, if not evasive for me to readily credit.

Thornton was far more candid in this area. Thornton thus acknowledged that normally working on forwatch is the captain, and materially, a deck crew consisting of the watchman and two deckhands, one of whom is the designated swingman. Similarly, normally working the afterwatch is the pilot, and working the deck, a mate and one deckhand. Thornton also testified more candidly that the watchman was always on forward watch (with the captain), and the mate was always on after watch (with the pilot), and either, very rarely on the other's watch. The mate and the watchman (I find) normally fill parallel positions over deckhands. Rare general alarm conditions that will find the mate and watchman on duty on the same watch, and the watchman then working directly under the mate, do not materially change that basic fact.

Called in rebuttal by the General Counsel, watchman David Pauley testified credibly that he gives the same kind

of instructions to deckhands in landings and lockings as does the mate; and he testified additionally, that in his experience there never has been a situation in which the three deckhands have been assigned to work on the same watch at the same time.

First, on the basis of the above, and other supportive evidence of record, I am persuaded that the three deckhands assigned to a boat are not to be found working on one shift for a locking, or landing. Far more likely to be the one to be found working on both shifts is the swingman, as provided for by the contract.

The watchman will take any lawful directions from the mate as to what the watchman (and deckhands) is (are) to do on the forward watch. As the General Counsel's rebuttal witness, David Pauley readily acknowledged that the mate has given him instructions about what he should do on an upcoming watch, etc., but just as a mate had done in the past.

In that regard, David Pauley testified specifically that the nature and type of the instructions given and received had not changed. Indeed, Pauley testified (without contradiction) that because of his own experience, he has given the same type directions to deckhands in both lockings and landings as have the mates.

According to David Pauley the only difference in their routine is that the mate orders supplies (below), and he does not. All of ORCO's watchmen have at least 5 years of river experience in their own right, and some are with even older reliability. I find that watchmen also issue routine directions to the deckhands, as do the mates to both watchman and deckhands.

During their respective watches the captain and the pilot are restricted to the pilot house. The captain however is in overall charge and otherwise establishes what work is to be done on the boat. Any of the deck crew will do what the captain individually tells them to do, from scrubbing the deck, to cleaning a dirty hold, to beginning seasonal maintenance (e.g., painting a given deck level of the boat). The mate during after watch, as the watchman during forward watch, will otherwise routinely go all over the boat and tow, checking lines and couplings, and checking the barges for water.

A mate may thus have occasion to assign an oncoming watchman the task of adding an additional barge rigging as the mate may deemed required, but either may add a required coupling; as could, and indeed would be expected of experienced deckhand.

Mates (understandably) will issue more instructions as to what is to be done to the less experienced deckhands, especially those who are recent hires without any river experience. But so also does the watchman, as would even a more experienced deckhand be expected to do, in that particular circumstance.

(d) *Vessel management appraisals*

According to Frasher, they settled at the February (1989) meeting how the management of the vessel was to be split (in the future) between master, pilot, and mate; and he asserts it had consummated a year's workshop in identifying the responsibilities of the vessel's managers; and, in assigning them (duties). They also developed an evaluation system that would measure the managers' performance.

The system was composed essentially of use of an existing ME program and form, namely, a performance appraisal program list of objectives and certain components; a guideline for the conflict of a performance appraisal interview; and a Performance Appraisal for Vessel Management form. (There was a discussion on performance appraisal by Noble and Thornton.) The related form, however, was to be used by others (e.g., a captain or pilot who were meeting there) to evaluate (at best) a mate, not for any anticipated use by a mate to evaluate another employee.

(e) *Contended management of supplies and inventories and safety vessel inspection*

The mate now does all ordering for the wheelhouse, galley, engine room, and deck, whereas he had ordered before only for the deck. Though there is mate-expanded ordering, the mate does not order engine parts, or do food ordering.

Contrary to Murphy understanding, and perhaps even his personal practice, Frasher testimony establishes that there are guidelines standardizing the supply of a boat with stores; and Employer catalogs to supply inventory. The Employer provides a Vessel Inventory Management System (VIMS). On weight of more credible evidence of record, I conclude and find that a mate's selection of the amounts of stores and/or supplies to meet those levels is accomplished by routine order. Moreover, Murphy acknowledged otherwise that: corporate personnel actually contact suppliers; the mate submits all receipts to ORCO's corporate office in Cincinnati for accounting; and, otherwise, there is an individual at the central warehouse to Paducah from which the mate can get supplies, or who will make arrangements for any necessary (but unstocked) supplies.

Murphy also testified that as a mate he now completes a (quarterly) Vessel Safety Inspection (VSI) form. The VSI form consists of 183 deck question areas and/or items in a mate section; 128 such in the engine room section; 14 in the cook's section; 7 in the pilot's section; and 6 in the captains section. The mate's responsibility is to see that the report gets completed. However, the mate primarily is responsible for the maintenance and update of the first 183 safety items/areas. He will either make any required deck correction himself, or assign a task to a watchman, or deckhand to do. Murphy explained he would take care of the replacement of a deficient life buoy himself, to ensure it was done. Whether he otherwise directed a deckhand or a watchman to do an item, he described as a judgment call, but one made on the basis of his evaluation of how experienced the deckhand was. Rebuttal witness David Pauley testified that as a watchman he (essentially) could do all the vessel safety inspection report required; though he also conceded that he didn't have assigned responsibility to do it.

(f) *Scheduling time off or vacations*

Mates have no responsibility or authority in granting time off, or scheduling vacations. With a normal work schedule being 30 days on and 30 days off, scheduling of vacations is simply not a factor in this matter. Grant of time off is handled in a manner that is also prescribed by the contract and/or practice, and does not involve the mate. Thus, an individual desiring time off has to write crew personnel and explain why the time off is needed. If an individual is shore-

side and doesn't want to take a tour, the individual has to contact the crew dispatcher (Judy Stroh), whatever is the reason.

Nonetheless, Frasher has considered the mates to be supervisors, and subject to management responsibilities around the clock. In essential summary, Frasher viewed the mates as supervisors in being responsible for: (1) the initial hiring of employees; (2) the mates evaluation of employees during probationary period; (3) involvement with an assignment of deckhands to their watch; (4) the (increased) deck training of deckhands; (5) the mates discipline of the deck crew; and (6) for the mates authority now to conduct (purported) annual evaluations of the entire deck crew, including watchman, deckhand, and swingman.

Frasher's assertion is that their responsibility of the mates to now conduct annual reviews of watchmen and deckhands was put into effect in the February (1989) meeting. The General Counsel essentially contends that much of the new authority purportedly granted mates in February and thereafter is illusory. In recent years past there hadn't been any periodic (annual) evaluations. To date, the mates had not conducted any periodic evaluations of the deck crew, except for Murphy, who asserts he did a few, without being told to do so.

(g) Discipline

Frasher has oversight responsibility for, and authority to, review all ORCO discipline. ORCO-imposed discipline doesn't need Frasher's (prior) approval. Nonetheless, certain discharge circumstances are regularly brought to Frasher's attention. E.g., a violation of Employer's alcohol and drug policy, or an instance of an employee's (gross) insubordination would be brought to Fisher's attention.

The ORCO captain's disciplinary authority is set forth above. It need not be repeated here, beyond brief note or comparison with discipline authority urged as now possessed by the mates, that the captain's own disciplinary authority is limited in the sense of being essentially that of an effective recommendation, but reviewed and authorized by certain home office personnel, namely, crew personnel manager Riegel and/or Port Captain Thornton.

According to Frasher, mates have now been made more responsible for deck discipline in the direction of the work force; and, for appropriate counseling where necessary. Frasher initially asserted that if a mate thinks a man should be suspended for 10 days, the mate may either use a conversation document to recommend it, or he can write a letter on it.

Frasher at one point asserted that it was not necessary that the captain of the boat have anything to do with a mate's discipline. But Frasher then went on to recount a captain is made aware of a written counseling when one is submitted by the mate; and it is the captain's option at that time to go along with the mate, or not. Frasher then related that a captain will investigate a serious situation, which Frasher broadly defined as any mate discipline other than a verbal or written reprimand. (No written mate discipline is evidenced herein.) In summary, in regard to mate discipline Frasher has testified in certain respects inconsistently, and at least to that extent, unconvincingly.

j. Mate counseling

On this record it is apparent that oral counseling was the prevalent form of mate discipline. Otherwise considered, a written record of a counseling is the next step in ORCO's policy of progressive discipline. In connection with written counseling, the Employer uses a special form, a conversation document.

A conversation document may be used to record a very poor employee performance, or a very exemplary one. Captains had used conversation documents for a couple of years before the mates were given a copy of the conversation document at the February meeting(s).

A conversation document (written counseling) is to be submitted to crew personnel (Riegel) and a copy of it is made and sent by the crew dispatcher to Port Captain Thornton, who keeps it on file, and who would be involved with any review and appropriate use later made of it. (The written information also goes to a master record file, for otherwise unidentified purpose.)

Brown recalled that on February 8, he discussed performance appraisal with the vessel managers group; and later (with Reigle), he took part in a small group discussion with the mates on supervision. Brown gave the group as an example of a mate's effective discipline in oral counseling, what is clearly in nature a mate's training advice, or teaching warning to a new employee, based on the mate's experience, namely, that working with back to the river will occasion the deckhand's falling into the river.

Brown gave as an example for a conversation document's use, either gross insubordination, or a severe act affecting the safety of the deckhand, the crew. Brown also asserts that he told the group that they should consider the seriousness of the event; and, if a (safety/work) rule violation, they should consider how many times it was violated; and the employee's attitude after a counseling. (Murphy confirmed only that in the presentment that Brown made on effective discipline on February 7, Brown had said that depending on severity, they could verbally counsel, or write to the personnel department.)

Brown initially related that on that occasion he told the mates that they would have to use their own best judgment when it was necessary to document any disciplinary actions they took. However, Brown then later acknowledged that a *mate's authority to pose whatever disciplinary action that they deemed best in their judgment was not a matter addressed in Brown's training presentment, nor at any that he has been involved in.*

Murphy relates that he has only orally counseled; asserting that he never had to do the other (written warning). Murphy recalled that he had counseled employees twice, specifically, one deckhand who did not get out of bed; and another deckhand on a safety matter. Murphy conceded that a watchman or an experienced deckhand could have done the same thing on the safety matter and that any employee could bring a deckhand's delay in relieving a watch to the attention of the captain; and revealingly, that a mate would not bring it to the attention of a captain until it became repetitive. Murphy acknowledged that he has never filled out a conversation document.

Brown initially asserted that he had seen conversation documents made out by mates in the crew dispatcher's box. There is no documentary evidence presented that any mate has ever used a conversation document; and seeming affirm-

ance from Thornton that none had to date. Brown then also acknowledged severally: that he doesn't see the conversation documents in normal course; that he doesn't know what happens to them; that it is actually out of his own area whether an employee is to be terminated for a conversation document; and that he had no knowledge what disciplines were available under the contract, nor even what triggers discipline. Brown also did not know the routing of the conversation document, asserting that Thornton would.

Thornton could add little in this area. Thornton initially simply asserted that he was having a hard time getting mates to fill out a conversation document on a regular basis. Thornton next asserted that the mates could handle most of it (deckhand discipline) without a conversation document, and that he went along with that. In the end Thornton acknowledged that he is not receiving conversation documents (from mates) in normal course. As noted, not one has been presented in evidence. Weight of more credible evidence convinces me that no mate had ever used a conversation document and I specifically and relatedly find that Brown (at best) was in error on the occasion of asserting that he saw mate conversation documents in the crew dispatcher's box. As noted at the outset, I conclude and find that oral reprimand was the prevalent form of mate discipline; and that it was of a type not recorded.

k. Thornton's letter of March 3, 1989, and conflict on the publication of the revised mate job description

According to Frasher, in early March, Thornton sent a revised mate job description to each boat captain for his review with the mate, and for posting on the bulletin board maintained on each vessel. Frasher did not personally know if a revised mate job description was actually posted on any boat's bulletin board.

By letter dated March 3, 1989, Thornton sent the revised job description, with direction that the captain read the mate's job description to the crew. Materially, the revised mate's job description covered a mate's responsibility: under safety, to conduct safety drills, and to conduct the incident/injury investigations; under navigation, to maintain proper deck watches; and under communications, to utilize conversation documents. The mates responsibilities under revised supervision have been considered above under "IV. SUPERVISION."

David F. Pauley testified credibly that he worked the L. Fiore towboat on March 3, 1989. Though he could not recall when he left the boat that month, Pauley relates that at no meeting in 1989 did a captain or a mate read mate's job description; nor did Pauley attend any meeting that year in which the captain or mate discussed it. Neither did he ever see one posted; nor is it discussed in any manner in aftermath.

According to Thornton, four captains that he later asked told him they did read the mate's job description to the crew. Called in employer rebuttal Harry D. Chambers, captain of the L. Fiore, confirmed that he read the mates job description to the crew the early part of April, at a monthly safety meeting, at which time all the crew but the pilot should have been present. Chambers also then asserted that Pauley was present when it was read. Chambers did acknowledge that he did not post it. No record was offered on Pauley's dispatch arrival, or departure. I find Captain Chambers did read the

mates job description as he has recalled, but that he is in error in recalling Pauley was there when it was read to the crew, because I credit Pauley he was not.

Murphy testified that he posted it (the mates' new job description) on his boat (Robert Tibolt), but Murphy did so (again) on his own. Company rebuttal witness Captain Howard Boggs confirmed that though he didn't see the letter, he did see the job description posted on the Tibolt when he boarded that boat sometime in March-April.

l. Ferguson's letter March 5, 1989, to the Union

On March 5, Ferguson sent a letter to Ward (copy to Bowen) notifying Steelworkers Local 14262 (for the first time) that:

[T]he Company will terminate the current collective bargaining agreement with your union upon its expiration date, June 30, 1989. Negotiations for a new agreement will cover the Watchman, Deckhands and Cooks. The Mates are supervisors and, therefore, we will not be bargaining with respect to them, and they will not be covered by any new agreement reached.

Ferguson's letter March 8, 1989, to the mates

On March 8, Ferguson wrote each mate, advising of the Company's action and advising the mates they were covered under the contract through June 30; and telling them that Employer would meet with them and their wives in the near future to discuss what impact it (the Company's action) would have on them.

m. The changes in mates' wages

As before mates receive a day's pay for each day on the vessel. However, by letter dated June 29, ORCO informed the mates that they would receive a \$30-a-day increase; a (30-percent) trip rate increase; a bonus, with a little larger percentage than unit employee received; (apparently) one additional paid holiday; increased insurances and retirement over that provided unit employees.

Murphy testified that it was earlier, on May 22, 1989, at a meeting of all mates with the Company at Huntington, that he first learned of the additional pay and benefits to be paid mates as supervisors. Murphy related that the Company at that time orally gave them a wage and benefit package and the mates wrote it down. Upon being made Charging Party's witness, Murphy acknowledged that on February 24, 1989, Murphy had earlier notified Union Representative Ward that he was a supervisor.

Murphy offered in explanation at hearing that he had done so at the time based on his own personal feelings that he has had ever since he became mate in 1978, that he was a supervisor, because he has always had the authority to assign duties to watchmen and deckhands. Whether Murphy has always personally so considered himself a supervisor, or not, I conclude and find Murphy notified Union of that claimed status no doubt (at least partly) as a result of the Employer's total presentment made on that status to the mates in the February meeting that Employer held with its supervisory masters and pilots, and which the mates had then attended for the first time. However, in the light of Ferguson's above March 8 letter, and in absence of any evidence to the con-

trary, e.g., testimony of any other mate as to earlier notice, I credit Murphy that he first learned of the increased pay and benefits to be paid as a supervisor, as he has recalled, on May 22.

8. June negotiations for a new contract

Negotiations for a new contract commenced on June 5; and the parties met thereafter on nine different days (3 days a week, over 3 successive weeks). On the first day, and at least three times and once a week thereafter, the Union (Ward) brought up the mates, and several times tried to negotiate substantive terms and conditions of employment for the mates. As many times the Company (Ferguson) took the position that the mates were (now) supervisors; and ORCO repeatedly refused to bargain about them. Terms and conditions of employment of mates were not (at least in any part unconditionally) negotiated. None of the above mate-related documents were ever presented to the Union during the negotiations (for Union review). Indeed, the Employer said they weren't even going to listen to it (in context, I find, the Union's attempts at negotiation of wages and terms and conditions of employment for the mates).

On June 22 the Union and the Company entered a separate agreement (letter of understanding below) as to how they would proceed on the mates' issue and on June 23 signed a new contract applicable to other unit classifications.

9. The interim union charge and the later complaint allegation

On June 10, after negotiations had started, and before entry of the letter of understanding on how they would proceed, the Union filed the instant charge, alleging, inter alia, an employer 8(a)(1) and (5) violation, "2. By refusing to negotiate on behalf of Employees under the Mates Classification in the existing Collective Bargaining Agreement." The Union continuously thereafter did not accept the Employer's exclusion of the mates from the bargaining as supervisors, but the Union's continued demands for bargaining on the mates were repeatedly not agreed to by the Employer because the Employer as firmly contended the "mates" were now supervisors; they were not appropriately included in the unit; and that the Employer was not obligated to bargain for them under the Act.

The complaint allegation

The complaint issued on July 27, 1989, and alleges specifically:

Since on or about March 5, 1989, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the classification of "mates," a classification included in the unit.

10. The interim negotiations

a. The June 22 letter of understanding

After advising the Company that the unfair labor practice charge had been filed, and after repeated unsuccessful attempts to bargain for the mates, upon the Employer stead-

fastly maintaining its position on the mates, Ward suggested to Ferguson that they reach agreement on all other issues and leave the resolution of the mates issue for resolution in this unfair labor practice proceeding. Prior to entry of their new (1989-1992) agreement Ferguson and Ward eventually agreed to terms of a related letter of mutual understanding dated June 22, which provides:

This letter sets forth the mutual understanding of the Union and the Company in regard to the bargaining unit status of the mates. The Union's position is that the Company should continue to recognize the Union as the representative of the Mates in a unit of Mates, Watchmen, Deckhands and Clerks. The Company's position is that the Mates are supervisors and that the Union should not be recognized as representatives [sic] of the Mates. *In order to expedite the negotiation of a renewed contract covering the Watchmen, Deckhands and Cooks, the parties have agreed that they will not seek to resolve the legal status of the Mates by negotiation, recognizing that this issue may be more appropriately determined by applicable legal proceedings.*

The Union has filed a charge [Case 9-CA-26554] before the NLRB in regard to this issue and reserves the right to pursue that charge to a final legal ruling. The Company reserves the right to defend that charge before the NLRB and the appellate courts.

If the position of the Union is upheld in a final judgment following such legal proceedings as the respective parties pursue as a result of this charge, the Company will recognize the Union as a bargaining representative of the Mates. The Mates will be automatically covered by the existing contract applicable to Watchmen, Deckhands and Cooks, which contract shall continue in full force and effect. The Company and the Union then will promptly negotiate, in good faith, the wages and benefits to be applicable to the mates under that contract, with the understanding that, if those negotiations fail to produce agreement, the Union will have the right to strike with respect to those issues (and only those issues). [Emphasis added.]

The above document appears as initially corrected at Ward request to include a right to strike as had been previously required by the Union in the absence of an employer agreement to resolve the issues by arbitration. The content of the letter of understanding was then reviewed by union counsel, telephonically, before the parties recorded their agreement to the letter of understanding by signing the document on June 22.

b. The 1989-1992 contract

On June 23, the parties executed a new 1989-1992 agreement covering all the prior unit employees, excepting mates. On June 29, the Employer sent each mate a letter stating that as they knew, effective July 1, the mate was now a management employee. The letter set forth their higher pay and benefits, as summarized above, and with notice that overtime pay ceased as of July 1.

11. Other postcharge correspondence

Thornton's July 18 letter to watchmen and deckhands, re mates' authority

On July 18, Thornton sent a memo (prepared by Noble and Thornton), to all watchmen and deckhands in regard to supervisory authority and responsibility of the mates with purpose to clarify the responsibility of the mates. It was to be posted. The memo states: the mate is in charge and has responsibility to see that the work of the deck crew is performed properly; the mate has the supervisory authority to carry it out; and, "*The safe, skillful and efficient work of the deck crew is essential to the proper operation of the vessel.*"

Analysis, Conclusions, and Findings

The 1962 unit determination that first explicitly addressed the disputed mate classification status and then included mates in an appropriate unit for collective bargaining, and the more recent (at least) 1986-1989 collective-bargaining agreement's (boat unit) coverage of all mates, make out a strong prima facie case for the General Counsel that a collective-bargaining unit that has long included mates remains appropriate; and, that the Union was and is the exclusive collective-bargaining agent of an appropriate unit of employees, which has included all the employees in a classification of mates.

The General Counsel further established that since (at least) on or about March 5, 1989, and thereafter, the Employer announced its intent to, and has in fact since then failed and refused to continue to bargain with the Union about the wages, hours, and other working terms and conditions of employment to be applicable to all of its mates, after the 1986-1989 agreement expired.

Date aside for the moment, the General Counsel has made out a very strong prima facie case that by the act of the Employer's refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the "mates" classification included in the unit, the Respondent Employer has thereby engaged in conduct in violation of Section 8(a)(5) and (1) of the Act, as is specifically alleged in the complaint.

The Employer has centrally defended that as of March 5, 1989, its mates were supervisors. Frasher has asserted he had considered the mates supervisors even earlier, from the first time the Employer told them of their involvement in ORCO's orientation phase of screening and hire of job applicants (in March 1988). Be that as it may, I am convinced that Frasher did not tell the mates, or the Union, at that time that mates were being made statutory supervisors, but rather he told the mates only what the Employer wanted the mates to do to assist in ORCO's screening and hiring process of primarily new employees with no prior river experience in a period of substantial hiring that ORCO was about to enter after a long period of business depression, and retrenchment.

Frasher has more plausibly related that he viewed the (ORCO) mates to be supervisors as of March 5, 1989, because by that time he viewed the mates were responsible for: the (initial) hire of employees; posthire evaluations (of probationary employees); (regular) evaluations of deck employees; direction of the work force; assignment of positions, in overtime conditions; and deck discipline, including any ap-

propriate counseling where necessary. Frasher also relied on the assigned responsibility of the mates for: the on-board training (primarily) of new employees; conduct and maintenance of the Employer's new (on-board) safety campaign; performance of accident and injury investigations; and for their managing of cost control programs (supply ordering).

The Employer thus centrally defended (and the General Counsel and the Union have in turn centrally disputed), that as of March 5, 1989, all ORCO's mates were no longer appropriately to be included in the unit because they were then contended supervisors within the meaning of the Act. Moreover, the Employer urges that by its letter of March 5, 1989, to the Union, the Employer had notified the Union of the fact that its mates were now supervisors. The Employer urges it has thus lawfully stated that it would not bargain with the Union about the wages, hours, and working terms and conditions of employment of its mates in the future, nor would the mates be covered by any new collective-bargaining agreement that was to be negotiated by the parties to take effect after the expiration of the (then) current agreement.

Section 2(3) of the Act as amended pertinently provides: "The term 'employee' shall include any employee . . . but shall not include any individual employed . . . as a supervisor"

Section 2(11) of the Act provides:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Bargaining patterns and position nomenclature are frequently mixed in this particular industry; and, bargaining unit combinations of employees, and (separately) of supervisors proliferate as a result of various negotiation, consensual agreements, or other determinations. See general discussion, *A. L. Mechling Barge Lines*, 197 NLRB 592, 593-594 (1972), overruled in other regard, *Power Piping Co.*, 291 NLRB 494, 497 fn. 11 (1988). Board viewpoint appears undisturbed that in the end, whether mates are statutory supervisors, "depends upon their actual status at their particular employer," *Mechling Barge*, supra, 197 NLRB at 594. The Employer may continue to rely on the generally meritorious observation that the Board and the courts have examined the amount of actual authority that an employer has vested in the mate, and ruled on a case-by-case basis, cf. *NLRB v. North Arkansas Electric Cooperative*, 446 F.2d 602, 608 (1971); but the Employer may not rely heavily on the title given them, *Masters, Mates & Pilots (Local 28)*, 136 NLRB 1175, 1191 (1962), enfd. 321 F.2d 376 (D.C. Cir. 1963).

In regard to the Employer's central defense that the mates are supervisors, in the light of the General Counsel's strong prima facie case that the Employer has ceased bargaining for the classification of mates, a classification long included in the unit, and as long covered by various successive collective-bargaining agreements, the Employer had at least a burden of going forward with the evidence. Thus, as the party

urging that supervisory status then existed effectively for an entire classification of employees, mates, the Employer (at least) had the initial burden of offering some proof of the supervisory status of *all* employees who occupy the classification of mates that would justify (as ORCO has essentially argued) its refusal to bargain about the entire classification of mates because now composed entirely of statutory supervisors, *Soil Engineering Co.*, 269 NLRB 55 (1984); and, see and compare *Ohio Masonic Home*, 295 NLRB 390, 393 fn. 7 (1989). Cf. also *Rahco, Inc.*, 265 NLRB 235, 247 (1982); *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979).

It is seemingly alternatively to have been urged at hearing and/or in brief, that the mates were at that time properly excluded from the unit, if not in certain respects as supervisors, then as managerial employees who are also excluded from the coverage of the Act. In any event, to the extent the Employer's urged defense is to be viewed as resting on managerial claim, the Employer must also offer some proof to establish all the mates were managerial employees.

As to any separate managerial contention being urged, employees are to be excluded as managers only if they "formulate and effectuate management policies by expressing and making operative the decisions of their employer." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288-289 (1974); or "have discretion in the performance of their jobs independent of their employer's established policy." *General Dynamics Corp.*, 213 NLRB 851, 857-859 (1974). See and compare generally, observation that the required managerial activity must be outside the scope of the (there professional) employee's duties routinely performed, *NLRB v. Yeshiva University*, 444 U.S. 672, 690 (1980).

Finally, whether a decision is to be made on supervisory or managerial issue, weighing the applicable factors involves a matter of ascertainment of the degree of authority actually possessed and exercised, cf. *NLRB v. North Arkansas Electric Cooperative*, *supra*. It has been relatedly observed that no matter how formidable the task, a supervisory authority only sporadically, or infrequently to be found in a nonsupervisor, must be distinguished from a supervisor's constant possession of supervisory authority, regardless of the frequency of its use, *Kern Council Services*, 259 NLRB 817, 818 (1981).

At the outset certain concluding findings on the mates questioned statutory supervisory authority may be readily determined. It is clear that the mates do not have the authority to lay off, recall, or transfer employees, nor to effectively recommend the same, let alone to do so with independent judgment. Rather, these subject matters are substantially and procedurally covered in the collective-bargaining agreement. Neither do the mates have any authority to schedule vacations of employees, or to otherwise grant unit employees time off. As noted scheduling of vacations is simply an alien concept to ORCO's 30-day-on-and-30-day-off work regimen; and a unit employee's securement of desired time off is effectively governed by terms of the contract and resides in the determination of others. Under the grievance terms of the contract(s) in evidence, the mate (as opposed to the master by specific reference), does not have any authority to adjust grievances.

The evidence that the Employer would rely on to establish certain supervisory assignment of work tasks and effective grant of overtime is limited and confused; and appears con-

trary to the terms of both past and existing contracts, and more regular established practice thereunder. In general, the mates' directions and/or assignment of tasks to watchmen and deckhands are shown on this record to be in the main, routine, just as they have similarly been determined to be in the past.

To be sure, the mates have had some new duties assigned to them, primarily to take the paper load off the captain. Consideration of those new duties presently set aside, the mates' directions and instructions given to watchmen and deckhands as in the past are clearly the result of the mates' greater experience and knowledge of what is to be done, and traditional leaderman position in laying out the work of the deck crew on their own, or on an upcoming watch. Limited evidence of a mate's possible occasional assignment of a deckhand to a particular watch on reporting to the boat, in place of the captain, who still continues to do so, is not persuasive of the contrary.

At least half the time, a deckhand on dispatch to a boat regularly takes the watch of the individual deckhand he is relieving. The past practice that the captain will otherwise assign the watch to two deckhands on arrival at the boat, still continues at least in some unspecified degree. Mere assertion that mates are empowered to now assign watches independently, on close analysis is singularly unpersuasive of the assertion being advanced. With limited proof offered, the degree of indefiniteness of such occurrences then becomes only the more so with additional consideration that *either* of the more senior deckhands have contract right to bid, or not bid the swingman's normal forward watch. Thus, the weight of the more credible evidence has wholly convinced me at in the main the nature of the mates assignment of duties to deck crew has remained essentially, as it was heretofore determined to be, basically that of a skilled leaderman laying routine deck work out, repetitively.

In locking or landing, a regular work situation may become anything but routine in certain sense. But this obviously hasn't been of recent development in the Employer's operations conducted up and down the river. To the contrary, it is clear those conditions have preexisted for years, and persist. The skill and years of experience of ORCO's mates account for the mates' superior position in giving instructions and directions to watchman and deckhands, just as a watchman's skill and experience level accounts for the watchman's issuance of directions to other deckhands, in these and other difficult and dangerous work environs, and which instructions, when given, are routinely obeyed by less experienced deckhands. Issuance of instructions in such circumstances does not by itself constitute an exercise of statutory supervision, so much as it portrays a leaderman's direction of the work force through skilled and experienced direction.

But it is argued that the hiring of new deckhands who are now with little or no river experience is a development that has created much different work conditions for the mate to supervise. The frequency and detail of the mates' instructions given, surely vary with the degree of experience of the working deck crew, but so do those of the a watchman in like circumstances, because the river experience of the watchman is greater in turn than the less experienced deckhand on his watch. Thus, a deckhand on watch with the watchman regularly obeys the same type instructions and directions given to him (them) by the watchman, in the same dangerous or

emergency conditions. Moreover, landing and locking situations occur as regularly on forward watch, as they do on after watch; and mates are not regularly present on forward watch at the time when the same type leadership is required for the landings and lockings.

There is some degree of confusion if not actual conflict in the record generated in regard to ORCO's claim of the mates' authority to assign watches to deckhands, particularly with regard to circumstances resulting in overtime. The Employer relies on the mate job description's reference under navigation to the mate having responsibility now to maintain proper deck watches. As urged by Frasher, that refers to a mate's responsibility for proper distribution of deckhand experience on the watches. The claim rests on supportive Murphy conduct in selecting on his own a more experienced deckhand (rather than an inexperienced swingman) to work with Murphy and another inexperienced deckhand on after watch in a locking situation.

Conflict therewith arises from certain terms of the contract, and other confirming testimony of two watchmen essentially that the captain may and still does assign initial watch; and that so far as they know and understand it is the captain who under the contract authorizes a change in shiftman watch, and who authorizes overtime.

As earlier noted, at least half the time a deckhand is individually relieved. In those instances the dispatched relief deckhand is routinely assigned to the watch of the deckhand being relieved. If relief is otherwise, and does not involve assignment of the swingman, past practice has been and has at least in part continued to be that the captain assigns the reporting deckhands to either forward or after watch. Only Murphy appears to have related instance of mate destination of watch in a locking situation, rather than the captain.

At the outset then, I further note the mate's job description under navigation also required that the mate utilize proper deckhand watch change procedures. I have earlier found that the evidence did not persuade that the mates now regularly assign relief deckhands to watches. I now further find that the evidence offered in support of the Employer's contention is too limited in the face of the import of past and present contract terms to establish supervisory status in mate assignment and/or watch change in landing or docking conditions, or otherwise in regularly affecting overtime.

On apparently September 26, 1989, regular mate Clinton Pauley took an extra trip as a deckhand, and, as usual, on arrival reported to the captain for watch assignment. Clinton Pauley was then assigned forward watch by the boat captain. Although on that occasion Clinton Pauley exercised his seniority to take the swingman's position on forward watch (whom he was relieving), under the contract he could have equally well have exercised his seniority and not been required to accept the swingman position that he was relieving.

Significantly, Clinton Pauley has also testified without contest that on that occasion, the afterwatch deckhand would have been bumped if Clinton Pauley had exercised his seniority right, and personally refused the swingman position assignment. Clinton Pauley thereby has indicated that the lesser experienced deckhand was on after watch and would have had to take the swingman position under (governing) terms of the contract. Though it does not appear to necessarily follow that an initial watch assignment (not involving swingman position) is otherwise filled pursuant to bid se-

niority, I find on this record, that in practice, absent the effect of bid right on swingman position, deckhand on dispatch normally took the watch of the person being relieved; and that in the circumstance where two deckhands were being simultaneously relieved, the captain has in the past assigned the watch to the respective deckhands, and generally continues to do so now. Clinton Pauley, who related that the mates' job description was not read to him, confirmed that his understanding remained that the captain authorized the shiftman's watch change. I also credit Clinton Pauley who confirmed that a change of the swingman's watch wasn't necessarily done on a trip with green deckhands.

The fact is that landings and dockings occur on both watches, and even watchmen have on occasion asked their captain (and mate) for use of the more experienced deckhand if the swingman on (normal) forward watch was too inexperienced. Reliance then on Murphy relation that on an occasion of two green hands he had selected a more experienced deckhand on forward watch is unique only in the sense that Murphy relates that he has picked the experienced deckhand without prior consultation and authorization from his captain. Though a watchman has similarly asked a captain and a mate about the use of a more experienced deckhand, which was subsequently arranged, there is no evidence presented that other mate's have, like Murphy, done so without first checking with their captain. There are other substantial reasons to conclude that mates regularly do first check with their captain, particularly since overtime is normally involved and the captain must authorize it.

In both locking and landing operations, overtime is more often the normal occurrence than not. Under the governing terms of the contract, the swingman is the designated position normally assigned to perform that work, which carries the overtime. Though more senior deckhand on arrival is able to bid for the swingman position, absent doing so, the least senior deckhand has to perform the position of swingman, and thus, under the contract, has to work on landings/lockings as they arise, and work the overtime required. Indeed certain contract terms declare that the swingman is required to do such work even *through* certain clear maximums to mandatory rest period, only at watch time does it contractually appear that the captain is authorized to assign the work and pay overtime to an off-duty deckhand to do the work while the swingman takes mandatory rest. It is in any event clear of record that the captain on all occasions still must sign as the Employer official who has authorized the overtime, and not the mate.

To the extent that Employer would seek to establish mate assignment of overtime, through Murphy's picking a more experienced deckhand from the forward watch to assist him in a locking or landing in after watch (in lieu of normal swingman help), normally involving an overtime condition, Murphy's act occurred in limited circumstances where both he other deckhands were inexperienced. The frequency with which that situation arose on other tours or hitches is not made apparent of record.

Even crediting Murphy that on such occasion Murphy has designated the more experienced deckhand on forward watch to work with him on after watch, I do, and further assuming that Murphy has continued to do so on other similar occasion, there is no showing that another mate has ever done so in his own right, let alone that all mates have done so

with any degree of regularity. Moreover, the captain, in necessarily having to sign off on all authorized overtime, effectively ratified Murphy's lead action in the matter. The record otherwise reveals that inexperienced swingmen are still being regularly used on landings and lockings on both watches in accordance with the contract's governing provisions.

Given the above (at best) limited showing of a mate's actual involvement in an other than routine captain and/or contract approved watch change and overtime assignment(s), in agreement with General Counsel, I conclude and find that to the related extent it is urged that mates regularly change deckhand watches and/or grant overtime, weight of evidence of both applicable contract terms and Port Captain Thornton and Murphy concessions that neither may violate the terms of the contract, would in the end more effectively persuade to the contrary.

Under the contract, and continued practice, the captain still authorizes overtime, and still has to sign off on it, not the mate. A mate serving as a conduit of any such captain's repetitive authorization order (be it deemed one standing, or to arise otherwise), or a mate thus designating the deckhand watch change (and overtime) under circumstances inherently likely to be authorized and/or necessarily ratified by the captain, who must authorize the overtime and/or the swingman's shift change, does not establish in my view that mates have been given real, or statutory supervisory authority in such matters.

It is clear that not only the more experienced deckhand's watch is being affected, but a swingman's contract duty assignments are being affected as well. (I am convinced on this record showing that three deckhands don't work one watch, not with a mate, and not with a watchman.) The mates' additional job description requirement to follow proper watch change procedures then would only serve to further confirm a mates' subservience to such contract terms, as Thornton and Murphy on at least certain other occasions have in effect appeared to concede.

It is in the end concluded that the weight of credible evidence is not sufficient to establish that mates with any degree of regularity have assigned deckhands to watches in their own right, let alone that all mates have done so. To the contrary, swingman watch changes still frequently occur, at standard captain direction. They still normally cause overtime; related contract terms still govern; captains still affect changes in watches; and a captain's individual authorization on overtime still is central to an employee's payment. Thus, I specifically find that mates do not under the above circumstances commonly and responsibly assign overtime, in any regular statutory supervisory sense.

Rather general finding to the contrary is more warranted and now made that the captain does, which finding essentially rests on the central facts: the contract still provides that overtime must be first offered to the most senior deckhand on board; and that it remains normal for a swingman to work lockings and landings, which normally involve overtime hours; that all overtime must be authorized by the captain; that an authorizing captain must individually sign off on it; and it is the captain only who is contractually permitted to change a swingman's normal assigned watches to accommodate the deckhand manpower needs on lockings and landings, and thus (at best) the captain who is authorized to change

the watches of deckhands other than the swingman on occasion.

In regard to mate deck discipline, the findings made above on the limited degree and observed nature of the prevalent form of mate discipline in oral counselings, which are not shown recorded in any manner in employees' files; and the literal dearth of any (written) conversation document issuance by any mate over a more than substantial 6-month period following the purported employer authorization of mate usage, in the end have also convinced me that such disciplinary authority that the mates really possessed is that which they have (at best) exercised, namely, oral reprimands, which were of type which they do not record, and which were not shown to effect employee status. General Counsel correctly observes such authority has been held to be too minor to convey statutory supervisory authority, *Ohio Masonic Home*, 295 NLRB at 394 (and see cases cited thereat). Neither is a mate shown here to have any authority to reward employees, or to otherwise grant wage increases or other benefits, all of which are set for unit employees by other terms of the contract arrived at as a result of negotiations and party agreement.

The mere training of other employees by a senior and more experienced employee, or that employee's evaluating another employees' skills in an assignment of routine work also doesn't establish supervisory status, *Sears, Roebuck & Co.*, 292 NLRB 753 (1989). In my view, neither Employer's additional act of formalizing the assignment of the mate's responsibility for training new deckhands, nor the issuance of a formal manual or other material for mate guidance and assistance in ensuring complete training, changed the non-supervisory nature of the basic deckhand training function here.

General Counsel also observes correctly that the mate's assigned role, or duty, in filling out the vessel safety inspection report, and in preparation of an incident or accident report, and the mates' involvement with ordering supplies for the entire boat, do not involve listed supervisory powers; or have the mates performance of those duties (especially as opposed to others, (e.g., watchmen) been shown to have impacted on the employment relationship of unit employees in a supervisory manner.

Neither does the mates' performance of any of these duties involve the mates in managerial duties of nature to establish the mates as the type of managerial employees who are to be excluded from the coverage of the Act. The mates are to be excluded as managers only if they "formulate and effectuate management policies by expressing and making operative the decisions of their employer," *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288-289 (1974); or are engaged in managerial activity outside the scope of their unit duties, but only if each of the mates "represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy," *NLRB v. Yeshiva University*, 444 U.S. 672, 690 (1980). The mates here are not shown to have occupied such executive-type positions, closely aligned with management, who "have discretion in the performance of their jobs independent of their employer's established policy," *General Dynamics Corp.*, 213 NLRB 851, 857-858.

To the contrary, the mates here are regularly involved in routine unit work duties (even with regard to clerical and/or

inventory work in observation and report on deficiencies in material, and corrections thereof), which follow ORCO's established policy, and which do not involve performance of any such excluding managerial, or supervisory activities, cf., e.g., *Ladish Co.*, 126 NLRB 555, 559 (1960); *Auto West Toyota*, 284 NLRB 659, 661-662 (1987).

This case in final analysis comes down to the question of whether the Employer's continuing use of certain of its mates since July 1988 in the evaluation of employees in ORCO's initial screening and permanent hiring processes amounts to an employer deposit of real supervisory hiring authority in all its mates; or, in reality, constitutes but another specialized but nonsupervisory use of its mates experience and skills, on a select basis, to aid the Employer in certain business (hiring) exigencies occasioned by a business upturn, and attrition from normal causes, after a long period of depressed business conditions. In my view that is the real and dispositive issue presented by this case, and the more difficult one to resolve.

Employer essentially contends that since July 1988 its mates have (at least) effectively recommended the hire and retention of new ORCO employees. An authority to hire, or to effectively recommend hiring, is clearly a listed supervisory authority. Section 2(11) is to be interpreted in the disjunctive; that is, possession of any one of the above explicitly expressed supervisory powers is sufficient to place the individual within the statutory supervisory definition, *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949), cert. denied 338 U.S. 889 (1950); *NLRB v. Edward Budd Mfg. Co.*, 169 F.2d 571, 579 (6th Cir. 1948), cert. denied 335 U.S. 908 (1949); though only when there is also conjunctive use of real independent judgment on behalf of management, *Poultry Enterprises v. NLRB*, 216 F.2d 798, 802 (5th Cir. 1954); and not judgment exercised that is but routine and clerical, *Sweeney & Co. v. NLRB*, 437 F.2d 1127, 1131 (5th Cir. 1971).

What is then to be the central and controlling factor is the actual possession of an enumerated authority, and its use with independent judgment; and not mere conclusory assertions of company officials that may be urged thereon, *Advanced Mining Group*, 260 NLRB 486, 507 (1982), enf. mem. 701 F.2d 221 (D.C. Cir. 1983). In explication of what is basely involved, it has been said in *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970), cert. denied 400 U.S. 831 (1970):

[T]he Board has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect.

The principle appears even only then the more warrantably applicable to a situation such as here, where effectively an entire unit classification of all mates is placed in issue. Resolution is then made only the more difficult where, as here, additionally involved is a required discerning consideration of the underlying circumstances that all the affected individuals occupy a unit classification held only by employees required by their employer to possess a high level of deckhand knowledge, experience, and skill to heretofore perform their assigned duties routinely. Thus the mates occupy a position akin to that of skilled tradesmen, only certain of whom how-

ever, have now also been shown made to have intermly functioned in a regular judgmental manner (I find below) principally in the area of hire (selection and retention) of new employees, with mates' certain evaluations and/or written recommendations variously involved therein; and with a reliance by their Employer explicitly claimed to have been advanced thereon, with some apparent justification.

Apart from a consideration of the cross-claim of General Counsel of there actually being an independent employer review made of the mates evaluations of probationary employees, it is essentially urged by General Counsel that the recommendations of the mates contained herein are based essentially on the mates' evaluative judgments made for their Employer that primarily rest on the mates' exercise of their skilled deckhand expertise, but not engagement in actions connoting possession and exercise of real supervisory authority within the meaning of the Act. There is merit to the contention. Cf. *NLRB v. Southern Bleachery & Print Works*, 257 F.2d 235, 239 (4th Cir. 1958); and see particularly also the underlying Board representation case of *Southern Bleachery & Print Works*, 115 NLRB 787, 791 (1956), in which the Board early pertinently said:

Throughout the industry of this nation, there are highly skilled employees whose primary function is physical participation in the production or operations processes of their employer's plants and who incidentally direct the movements and operations of less skilled subordinate employees. These artisans have a close community of interest with their less experienced coworkers and the amended Act has preserved for them the right to be represented by a collective-bargaining agent in dealings with their employers. The Board has therefore, consistently included in bargaining units such employees, often craftsmen or persons in comparable positions, whose authority is based upon their working skill and experience.

We have no doubt that almost any employer when told by a skilled craftsman that his helper is incompetent and that he needs a new helper if he is properly to perform his functions, would accept the judgment of the craftsman. While this may be called effective recommendation, it is inherent in the craftsman-helper relationship, as Congress obviously knew. [Footnotes omitted.]

The General Counsel thus contends firstly that none of the mates have exercised the authority to hire, as personnel has done all actual hiring of both probationary and permanent employees. The circumstance that ORCO's personnel department has done all actual hiring, appears not to be contested; and, in any event, on clear weight of credible evidence of record bearing thereon, I conclude and find that none of the mates have actually hired any employees. The issue is whether they have effectively recommended the same.

In contrast with the Employer's claim that the mates possess and have regularly exercised a statutory supervisory authority to effectively recommend (a) the hire of candidates for employment; and (b) the hire of probationary employees for permanent employment, the General Counsel further contends that the mates have exercised no real statutory supervisory authority in their part in selectively recommending

certain candidates for employment for hire; and the mates have neither uniformly, nor consistently evaluated the probationary employees, and such evaluations as certain mates have made on probationary employees were not statutorily effective recommendations in that they are independently reviewed.

There is no question the Employer had already done substantial screening of applicants before (certain) mates ever became involved. All the applicants, or candidates for employment, had been already substantially prescreened by the Employer's personnel for employment, in that ORCO personnel had received their submitted applications; had reviewed and contacted their references; had interviewed the candidates; had required them to first take and necessarily pass a physical examination, and then a drug screening test. Thus, not without some appreciable record support does the General Counsel argue that the candidates for employment when assembled at the Paducah training facility, had already substantially established (at least) generally to ORCO personnel satisfaction that they were employable by the Employer.

The Employer would have noted, the Board has heretofore adopted a finding that mates' issuance of instructions to deck crewmembers, particularly during locking and docking, had involved exercise of independent judgment, and that those mates were concluded to be supervisors, *Master, Mates & Pilots Local 28*, 136 NLRB at 1203. However there it was also evidenced and found that the orders of those mates had to be obeyed at the risk of discharge, e.g., *id.* at 1199, 1203; and, unlike the mates' long employee unit representation here, those mates had not theretofore been represented in an employee unit of deckhands and cooks, etc., but rather had been represented in a unit of other supervisory boat officers, namely, masters and pilots, *id.* at 1178.

Where, as was essentially long ago held here, the instructional or directional relationship, being accomplished by and under whatever named classification, is determined to be more team effort in the performance of routine tasks of (even skilled) employees than a responsible direction of the crew with independent judgment on behalf of management, and/or the involved actions, instructions, directions are more to be accounted for as, or to be likened to, actions, directions, in instructions imparted merely by individuals with greater skill to those with less skill (albeit it working occasionally in dangerous conditions and environs), i.e., akin to that of journeyman to helper, the Board (as earlier herein) has concluded otherwise, *A. L. Mechling Barge Lines*, 192 NLRB 1118, 1119-1120 (1971).

Weight of evidence presented herein supports General Counsel's contention that the mates are brought to the Paducah training facility to lend the knowledge, skill, and ability in deck work matters to accomplish an orientation of candidates for employment, and to conduct an evaluation of the indicated deckhand capability of candidates otherwise fully screened for employment.

Again not without a significant measure of evidence persuasion would General Counsel have it concluded from the above-detailed evidence, that the mates were told what was expected of them at the Paducah orientation phase, would be only selectively expected of them. Thus in analyzing the question of supervisory status of the entire classification of mates, at least in regard to recommendations made on can-

didates for employment, it is both wholly warranted and significant to observe, that to date, at most 9 of 16, or a little more than half have participated in the orientation and final prehire screening phase of the candidates for hire; and it appears in the last year, even less participated in actual evaluation. It is unclear how many mates were there in attendance to ensure equipment, etc., was ready. In any event, such is not supervisory activity.

It is similarly warranted to observed that the selected mates (at best about half) each time received detailed instructions themselves as to what they are to do and cover. In that regard the record does establish that certain selected mates were there to and did explain the Company's (towboat) policies and procedures. They were there primarily to demonstrate to the candidates some of the representative duties and tasks of a deckhand; and to use their own lengthy experience and skills to test and evaluate if the candidate appeared to them likely to be capable of performing the necessary skill tasks, and the physically demanding work, and/or work safety in the sometimes dangerous work environment.

To be sure the evaluating mates were eventually directed (starting in February 1989) to evaluate the candidates for employment in certain identified work areas, but simply and primarily to evaluate working skill, ability, safety, and general work and company attitudes, but notably without any effort made by the Employer otherwise to train the mate in the use of their own skill and ability to effect an evaluation. It is clear enough to me that the Employer was relying in substantial measure on what the selected mates brought in deckhand skill and experience to the evaluation of the already otherwise selected candidates for employment, as the General Counsel has contended.

The General Counsel also contends that the mates' evaluations of probationary employees, such as shown herein, are also not sufficient to establish that the mates have statutory supervisory authority to effectively recommend hire of permanent employees. There is no evidence presented that all mates have participated in this evaluative process. To the contrary, if anything, it would appear to have been less this last year. Be that as it may, General Counsel contends that even the participating mates involved are not engaged in statutory effective recommendations or permanent hire, because the evaluations that they have made are shown to be independently reviewed by Port Captain Thornton. Again there is substantial evidence to support that contention of General Counsel.

Much of that evidence has been earlier addressed and need not be remmarshaled here, except in summary to observe: the evaluations are not being turned in by all mates; those that are turned in were previously directed to be, and generally have been signed by the captain; the mates are clearly expected to, and clearly regularly did obtain evaluative input from watchmen, with whom the deckhands as frequently, if not more often, work; the watchmen sometimes sign on the evaluation, indeed a watchman's evaluation has been sought and carried the day for a mate over a captain indicated initial disagreement; and finally, all the evaluations are submitted to personnel, and a copy of each is sent to the port captain, who has independently evaluated them; selectively given weight to some, and not to others; and otherwise exercised clear independent judgment in supplementing them from a variety of sources.

Another factor supporting a conclusion that the mates are not supervisors is the high ratio of supervisors (3) to deck crew (4) (including 2 to 1 normally on afterwatch) that otherwise would result if mates were concluded to be supervisors. There are other indications that the Employer was enlisting the expertise of its mates in training and development of new hires with no river experience. The very memos and correspondence addressed the matter of the mates part in training a new skilled work force. However, such considerations do not make the determination more definitively drawn.

Although the matter, in my view, remains a close question, the mates' evaluations here, appear to me, on balance, and on the weight of the evidence above to present circumstances of an Employer's specialized reliance on its most skilled employees, of nature more akin to, and thus controlled by the considerations of *Southern Bleachery*, above. Accordingly, I conclude and find that the mates here are not established to be statutory supervisors, but rather essentially have remained as they were, and heretofore determined to be, skilled leadermen upon whose judgments on candidates for deck-hand development the Employer has come to rely; and whose, evaluations on probationary employees, when received, the Employer's port captain has considered, and more often than not followed, but not without bringing an independent review to the reports submitted.

Of this I am reasonably certain in this record, not all the mates are participating in orientation, nor submitting evaluations of probationary employees; and, even of those that do, not all have the port captains trust and confidence. This is not effective recommendation. If the Employer is actually additionally training and observing certain mates for supervisory promotion, that does not warrant that all mates forfeit their unit status. Accordingly, I conclude and find that the mates are not statutory supervisors with the power to effectively recommend hire; but employees who because of their knowledge, skill, and experience are leadermen in whom the Employer has special confidence.

Since an employer acts at its peril in believing an individual is not an employee, let alone does so if it errs as to an entire classification of employees concerning whom it unquestionably had a duty to bargain otherwise, *NLRB v. Bardahl Oil Co.*, 339 F.2d 365, 367-370 (8th Cir. 1981), it follows that by failing and refusing to bargain with the Union about the wages, hours, and working terms and conditions of employment of the mates, the Employer has violated Section 8(a)(5) and (1) of the Act as alleged in the complaint.

But there would appear to be still another reason for concluding that by the Employer's failure to bargain with the Union about the classification of mates, the Employer has here violated Section 8(a)(5) and (1). In the circumstances of this case the Union was not obligated to bargain about unit scope, which was a nonmandatory subject of bargaining and it had not waived its right to bargain for the mates.

The Employer's position that it could elect to no longer bargain with the Union about the mates in the upcoming contract because they were statutory supervisors was one that might be effectively advanced by it were the prior inclusion of mates an inclusion of theretofore existing statutory supervisors, and their prior inclusion one by voluntary agreement of the Employer, cf. *Newspapers Drivers Local 372 v. NLRB*, 735 F.2d 169, 971 (6th Cir. 1984), cert. denied 470

U.S. 1051 (1985). But that was clearly not the underlying circumstance here, independent of the finding that mates are not statutory supervisors.

To the contrary the mates here were included in an appropriate unit after a Board determination was made of their disputed placement; and coverage under successive collective-bargaining contracts had ensued for years. I need not resolve whether any certain individual mate may have sufficiently evidence that he is regularly exercising a supervisory power of effective recommendation, (e.g., most notably, Murphy), though again, for the reasons stated, it would appear not. However, in that very regard, even were the mates supervisory status to have been concluded otherwise, although it has been held that an employer's promoting individuals as supervisors without bargaining does not violate the Act; it is otherwise where the promotions result in the elimination of a unit classification, *Pittsburg Metal Processing Co.*, 286 NLRB 734 fn. 2 (1987).

An employer may not insist to impasse on a contract proposal that alters an established unit description, a nonmandatory subject of bargaining, in violation of Section 8(a)(5) and (1) of the Act, *Standard Register Co.*, 288 NLRB 1409, 1411 (1988). The Union had no obligation on its part to meet and bargain with the Employer about the exclusion of mates from the unit, *Buzzoto's, Inc.*, 277 NLRB 977 (1985).

The Employer in brief has advanced a number of other arguments, which have considered and conclude not to be persuasive. I would only additionally note: First, I have no quarrel with the observation of the Employer that the Employer's unilateral changes in the duties of its mates made from March 1988, on through February 1989 are not allegations of the instant complaint. They are not. Nor, for that matter is the Employer's renouncement (captains' reading to crew) on the mates' new job description which occurred in late March or early April.

However, the Employer's failure to bargain about the unit's classification of mates since March 5, 1989, clearly is and, to the extent the Employer would seek to raise 10(b) argument to that allegation, the argument is as clearly without merit. Indeed, there is a question whether the alleged violation of failing and refusing to bargain about the mates, a classification in the unit, occurred on March 5 when the Employer first notified the Union of its intent not to bargain for wages, hours, terms, and conditions of employment of the mates in the new contract, or when it actually refused to bargain thereon upon Union's demand in the start of negotiations in early, June 1989, cf. *Howard Electrical & Mechanical*, 293 NLRB 472 (1989); and cf. the case cited thereat, *Swift Independent Corp.*, 289 NLRB 423 fn. 11 (1988).

If the failure to bargain on an entire classification (thus) scope of the unit were not involved, and it were a simple announcement of new working conditions as an implementation of policy, it would then be otherwise, cf. *Ciba-Geigy Pharmaceuticals*, 264 NLRB 1013, 1018 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983); as it might be if the Employer's changes result in a new classification of employees that involves the scope of the unit, where *neither* party is obligated to bargain thereon, cf. *United Technologies Corp.*, 292 NLRB 298 (1989), though not even then necessarily would the employer avoid a finding of a violation of the Act in refusing to bargain, if it shows no reason for an exclusion of

a substantial group from the unit, *Bay Shipbuilding Corp.*, 263 NLRB 1133 (1982). As noted, promotion of an entire unit classification of employees to supervisory position is not such a reason, *Pittsburg Metal Processing Co.*, 286 NLRB 734 fn. 2 (1987).

Here, however, it is otherwise, because there has been found to have been an employer failure to bargain about the mates, alleged to be a classification in the unit. The proof offered established that the Employer refused to bargain on union demand, on the entire unit mate classification, i.e., all the mates. An employer's attempted alteration of a unit's scope is a nonmandatory subject of bargaining, *Bozzuto's, Inc.*, supra. So would be an employer's attempted alteration of a unit without a union's agreement, as was done here.

Moreover, it has been held that an employer's exclusion of a new classification may not only be an acceptable mode of analysis of an alleged refusal to bargain over the classification, but is wholly separate from allegation of a failure to bargain resting on allegations of an employee making unilateral changes as constituting the violation of the Act, cf. *United Technologies Corp.*, supra.

Finally, the parties letter of understanding of June 22, 1989, clearly does not state a waiver of Union's statutory right to bargain collectively for the unit mate classification, *Collateral Control Corp.*, 288 NLRB 308, 309 (1988). The Employer's related argument to the contrary or its argument that the Employer's failure to bargain over the scope of unit's mate classification was raised *sui juris* by me do not pass muster of fair reading of the specific complaint allegation and charge circumstances, nor relatedly, the General Counsel's opening statements on the complaint allegation, and the statement of position on the meaning of the June 22, 1989 (underscored) reference not to try to resolve the disputed matter through negotiation, as not constituting any waiver by the Union of its right to bargain for the mates, but as being no more than expression of the parties' then agreement not to hold up negotiations on other contract matters, and to resolve their dispute on the mates within the framework of the unfair labor practice charge process sought here. Not only is the contention plausible, I have credited Ward that the parties had not been able to reach that accommodation, there would have been an entire unit work stoppage.

By the time of the agreement the Union had already filed a very specific charge, full pursuit of which it exempted in the agreement; which it has pursued; and which in turn the General Counsel's equally specific complaint allegation presently addresses. Unless one is prepared to say that a union's right to decline bargaining on a unit classification exclusion, a nonmandatory subject, is really but a conditional right that is actually subservient to some earlier employer unilateral actions in changes of underlying duties, which under my understanding of the above-existing Board precedent I am not, the two allegations, as different causes of action, in my view, remain distinct.

CONCLUSIONS OF LAW

1. The Ohio River Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Steelworkers of America, Local Union 14262, AFL-CIO-CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the classification of "mates," a classification included in a unit appropriate for collective bargaining, Respondent Employer has engaged in conduct in violation of Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be offered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes and policies of the Act.

Because I have found that the mates are employees, and that the Respondent Employer has failed, and continues to fail to bargain with the Union as the exclusive collective-bargaining representative of its mates, a classification in an appropriate unit, in addition to recommending that it cease its unlawful refusal to bargain with the Union over the wages, hours, and working terms and conditions of employment of its mates, I shall further recommend in keeping with the parties conditional agreement of June 22, 1989, that the Employer (1) henceforth apply the terms and conditions of employment of the 1989-1990 contract to mates; and (2) upon request of the Union, the Employer meet with the Union and bargain on the wages and other benefits for mates.

It will be further ordered that the Employer make the mates whole for any loss in pay or benefits they may have suffered as a result of the unfair labor practices found herein, but nothing contained herein shall be construed to require the withdrawal of any pay or benefits that the mates may be presently receiving. Any amounts due, plus interest, will be paid as prescribed *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). An appropriate notice to employees will also be provided.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, The Ohio River Company, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the classification of "mates," a classification included in the unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize United Steelworkers of America, Local Union 14262, AFL-CIO-CLC as the exclusive collective-bargaining representative of its "mates," a classification in the unit.

(b) Henceforth apply the current collective-bargaining agreement to the unit classification of "mates" as provided

²If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

for in the parties' agreement of June 22, 1989; and, on union demand, bargain with the Union about pay and other benefits for the unit classification of mate employees.

(c) Make whole all the unit mate employees for any loss of pay or other benefits (if any) they may have suffered as a result of the refusal to recognize and bargain with the Union as a representative of mate employees, in the manner described in the remedy section of this decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post on the bulletin boards at the facilities in Cincinnati, Ohio, Paducah, Kentucky, and Huntington, West Vir-

ginia, and on each towboat of The Ohio River Company in operation on The Ohio River and its tributaries, copies of the attached notice marked "Appendix."³ Copies of the notice on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."